

RECEIVED
FILED

JUN 15

Supreme Court of the United States

OCTOBER TERM, 1971

71-
NO. 1002

[Handwritten signature]

REUBEN O'D. ARKEY, et al.,

[Handwritten signature]

THE AMERICAN WATERWAYS OPERATORS, INC., et al.,

[Handwritten signature]

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA**

**NOTICE OF APPEAL FILED DECEMBER 23, 1972
PROBABLE JURISDICTION NOTED APRIL 17, 1972**

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 1082

REUBIN O'D. ASKEW, as Governor of the State of Florida; RICHARD B. STONE, as Secretary of State of the State of Florida; ROBERT L. SHEVIN, as Attorney General of the State of Florida; FLOYD T. CHRISTIAN, as Commissioner of Education of the State of Florida; DOYLE E. CONNER, as Commissioner of Agriculture of the State of Florida; FRED O. DICKINSON, JR., as Comptroller of the State of Florida; THOMAS D. O'MALLEY, JR., as Treasurer of the State of Florida; as an constituting THE DEPARTMENT OF NATURAL RESOURCES, State of Florida; RANDOLPH HODGES, as Executive Director, and TOM SIMPSON, as Conservation Officer of Duval County, DEPARTMENT OF NATURAL RESOURCES, State of Florida; and THE STATE OF FLORIDA,

Appellants

vs.

THE AMERICAN WATERWAYS OPERATORS, INC., a Delaware corporation; GULF ATLANTIC TOWING CORPORATION, a Florida corporation; GLIDDEN-DURKEE, a division of SCM, CORPORATION, a New York corporation; DIXIE CARRIERS, INC., a Delaware corporation; OIL TRANSPORT COMPANY, INCORPORATED, a Louisiana corporation; NATIONAL MARINE SERVICE, INC., a Delaware corporation; THE REVILO CORPORATION, a Florida corporation; EASTERN SEABOARD PETROLEUM COMPANY, INC., a Florida corporation; NILO BARGE LINE, INC., a Delaware corporation; STEUART TRANSPORTATION COMPANY, a Delaware corporation; INTER-

STATE OIL TRANSPORT COMPANY, a Delaware corporation; FEDERAL BARGE LINES, INC., a Delaware corporation; GULF CANAL LINES, INC., a Texas corporation; and INGRAM OCEAN SYSTEM, INC., a Delaware corporation, all authorized to do business in the State of Florida,

Appellees,

and

SUWANNE STEAMSHIP CO., a Florida corporation; COMMODORES POINT TERMINAL CORPORATION, a Delaware corporation; AMERICAN INSTITUTE OF MERCHANT SHIPPING; ASSURANCE FORENINGEN GARD; ASSURANCE FORENINGEN SKULD; THE BRITIANNIA STEAM SHIP INSURANCE ASSOCIATION, LIMITED; THE JAPAN SHIP OWNERS MUTUAL PROTECTING AND INDEMNITY ASSOCIATION; THE LIVERPOOL AND LONDON STEAM SHIP PROTECTION AND INDEMNITY ASSOCIATION, LIMITED; THE LONDON STEAM SHIP OWNERS' MUTUAL INSURANCE ASSOCIATION, LIMITED; NEWCASTLE PROTECTION AND INDEMNITY ASSOCIATION; THE NORTH OF ENGLAND PROTECTING & INDEMNITY ASSOCIATION, LIMITED; THE STANDARD STEAMSHIP OWNERS' PROTECTION & INDEMNITY ASSOCIATION; THE STANDARD STEAMSHIP OWNERS' PROTECTION AND INDEMNITY ASSOCIATION (BERMUDA), LIMITED; THE STEAMSHIP MUTUAL UNDERWRITING ASSOCIATION, LIMITED; SUNDERLAND STEAMSHIP PROTECTING AND INDEMNITY ASSOCIATION; SVERGIES ANGFAITYGS ASSURANSFORENING; THE UNITED KINGDOM MUTUAL STEAM SHIP ASSURANCE ASSOCIATION (BERMUDA), LIMITED; THE WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG); and their respective members,

Intervening Appellees,

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA**

INDEX

Record from the United State District Court for the
Middle District of Florida

Complaint 1

Complaint on Behalf Intervening Plaintiffs
The American Institute of Merchant Shipping,
et al. 15

Answer to Plaintiffs' Complaint 27

Memorandum Opinion and Final Judgment 39

Chapter 70-244, Laws of Florida 1970 56

State of Florida, Department of Natural
Resources, Division of Marine Resources
Regulations, Chapter 16B - 16.08 73

33 U.S.C. § 1161 75

46 U.S.C. § 183 91

46 U.S.C. § 740 93

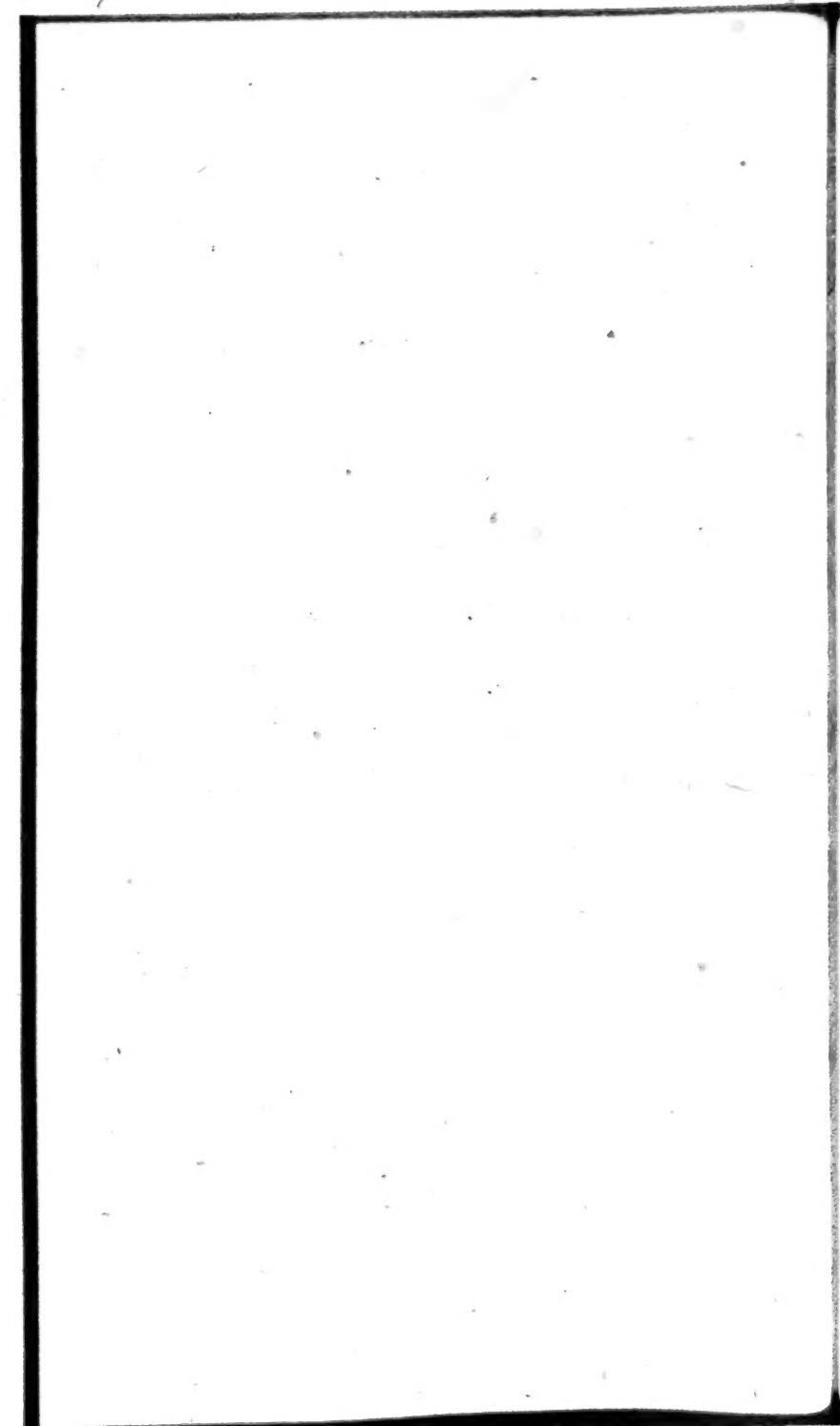
United States Constitution

Article III 94

Amendment V 94

Amendment IX 94

Amendment X 94



IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE, FLORIDA

THE AMERICAN WATERWAYS OPERATORS, INC., et al.,
PLAINTIFFS,

vs.

REUBIN O'D. ASKEW, et al.,
DEFENDANTS.

COMPLAINT

COMES NOW the plaintiffs, and for cause of action against the defendants, complain and allege as follows:

1. This action is for an injunction pursuant to the provisions of Sections 2281 and 2284(3), Title 28, United States Code. Sought to be adjudged unconstitutional and unenforceable is the whole or separable parts of Chapter 70-244, Laws of Florida, 1970, compiled as Chapter 376, Florida Statutes, and the rules and regulations promulgated thereunder. The Constitutional provisions involved are: Article I, Section 8, Clause 3 (interstate and foreign commerce); Article VI, Clause 2 (supreme law of the land); Article III, Section 2 (Federal Maritime Jurisdiction); and the Fourteenth Amendment (due process and equal protection of law) of the Constitution of the United States.

2. The validity of Chapter 70-244 (which will be referred to hereafter as the "*State Act*") must be considered in conjunction with Public Law 91-224, (April 3, 1970) enacted by the 91st United States Congress prior to the State enactment, bearing the title: The Water Quality Improvement Act of 1970 (which will be hereafter referred to as the "*Federal Act*", and which act amended the Federal Water Pollution Control Act (62 Stat. 1155, as amended, 33 U.S.C. 466 et. seq.).

3. The plaintiff THE AMERICAN WATERWAYS OPERA-

TORS, INC. is a Delaware corporation (hereinafter referred to as the AWO) and is the nonprofit national trade association representing the barge and towing industry. Many of the approximately 223 members of AWO operate towing vessels and barges and small self-propelled tankers and freighters in the performance of transportation services into and upon the navigable waters of the United States, utilizing the inland waterways and intercoastal, coastal and harbor facilities in all the states of the nation where such exist. Numerous other members of AWO consist of shipyard companies, terminal operators and watercraft service companies whose businesses are directly related to shipping by navigable water. AWO has its executive offices at 1250 Connecticut Avenue, Suite 502, Washington, D. C. Many members of AWO are domiciled in the State of Florida and with other members domiciled elsewhere are all engaged in interstate commerce or other maritime activities operating into and upon the navigable waters of the United States to and from ports in the State of Florida.

4. The plaintiff GULF ATLANTIC TOWING CORPORATION is a Florida corporation located at 104 East Platen Road, Jacksonville, Florida (hereinafter referred to as GATCO) and is a member of AWO engaged in interstate commerce operating barges into and upon the navigable waters of the United States in interstate commerce to and from Florida ports, and also is a duly licensed terminal facility. GATCO operates its barges and tankers in interstate and international commerce both for private industry and under contract to the United States in support of its military services.

5. The plaintiff GLIDDEN-DURKEE is a division of SCM, CORPORATION, a New York Corporation authorized to do business in the State of Florida, having its place of business at Jacksonville, Florida. This plaintiff is engaged in interstate commerce operating barges and tankers into and upon the navigable waters of the United States to and from Florida ports.

6. The plaintiff DIXIE CARRIERS INC. is a Delaware corporation authorized to do business in the State of Florida,

having its principle place of business at Houston, Texas. This plaintiff is engaged in interstate commerce operating barges into and upon the navigable waters of the United States to and from Florida.

7. The plaintiff OIL TRANSPORT COMPANY, INCORPORATED is a Louisiana corporation authorized to do business in the State of Florida, having its principle place of business at New Orleans, Louisiana. This plaintiff is engaged in inter-state commerce operating barges and tankers into and upon the navigable waters of the United States to and from Florida ports.

8. The plaintiff NATIONAL MARINE SERVICE, INC. is a Delaware corporation authorized to do business in the State of Florida, having its principle place of business at St. Louis, Missouri. This plaintiff is engaged in interstate commerce operating barges into and upon the navigable waters of the United States to and from Florida ports.

9. The plaintiff THE REVILO CORPORATION is a Florida corporation authorized to do business in the State of Florida, having its principle place of business at Palatka, Florida. This plaintiff is engaged in interstate commerce operating barges into and upon the navigable waters of the United States to and from Florida ports.

10. The plaintiff EASTERN SEABOARD PETROLEUM COMPANY, INC., a Florida corporation having its principle place of business in Jacksonville, Florida, is engaged in interstate commerce as a petroleum cargo carrier, operating barges into and upon the navigable waters of Florida, Georgia and Alabama, primarily transporting fuel oil.

11. The plaintiff NILO BARGE LINE, INC. is a Delaware corporation authorized to do business in Florida, having its principle place of business in St. Louis, Missouri, and is engaged in interstate commerce operating barges into and upon the navigable waters of the United States to and from Florida ports.

12. The plaintiff STEUART TRANSPORTATION COMPANY is a Delaware corporation authorized to do business in Florida, having its principle place of business in Piny Point, Maryland, and is engaged in interstate commerce operating

barges and tankers into and upon the navigable waters of the United States to and from Florida ports.

13. The plaintiff INTERSTATE OIL TRANSPORT COMPANY is a Delaware corporation authorized to do business in Florida, having its principle place of business in Philadelphia, Pennsylvania, and is engaged in interstate commerce operating barges and tankers into and upon the navigable waters of the United States to and from Florida ports.

14. The plaintiff FEDERAL BARGE LINES, INC. is a Delaware corporation authorized to do business in Florida, having its principle place of business in St. Louis, Missouri, and is engaged in interstate commerce operating barges into and upon the navigable waters of the United States to and from Florida ports.

15. The plaintiff GULF CANAL LINES, INC. is a Texas corporation authorized to do business in Florida, having its principle place of business in St. Louis, Missouri, and is engaged in interstate commerce operating barges into and upon the navigable waters of the United States to and from Florida ports.

16. The plaintiff INGRAM OCEAN SYSTEM, INC. is a Delaware corporation authorized to do business in Florida, having its principle place of business in New Orleans, Louisiana, and has contracted to engage in interstate commerce operating barges and tankers into and upon the navigable waters of the United States to and from Florida ports.

17. The business and operation of each of the plaintiffs involves the transportation and handling of cargo which comes within the purview of both the *Federal Act* and the *State Act*.

18. Each of the plaintiffs, as interstate carriers, contributes to and facilitates the progress of interstate commerce in the United States and significantly advances the public welfare of Florida and the nation in its relations thereto. Each of the plaintiffs further recognizes and accepts the fundamental recreation and conservation values found by the Florida Legislature and expressed in the preamble to the *State Act* and will do all reasonable things for the preservation and

protection thereof.

19. The defendants REUBIN O'D. ASKEW, as Governor of the State of Florida; RICHARD B. STONE, as Secretary of State of the State of Florida; ROBERT L. SHEVIN, as Attorney General of the State of Florida; FLOYD T. CHRISTIAN, as Commissioner of Education of the State of Florida; DOYLE E. CONNOR, as Commissioner of Agriculture of the State of Florida; FRED O. DICKINSON, JR., as Comptroller of the State of Florida; and THOMAS D. O'MALLEY, JR., as Treasurer of the State of Florida; as and constituting THE DEPARTMENT OF NATURAL RESOURCES, State of Florida; and RANDOLPH HODGES, as Executive Director, and TOM SIMPSON, Conservation Officer of Duval County, DEPARTMENT OF NATURAL RESOURCES, State of Florida, under Chapter 20.25, Florida Statutes, and the *State Act*, are granted the power and duty to enforce, insofar as is material to this cause, the responsibilities set forth therein and the rules and regulations therein authorized. The defendant RANDOLPH HODGES, as Executive Director of the Department of Natural Resources is by Section 370.02(3)(b), Florida Statutes, charged with the statutory duty to act as the agent for the Board in coordinating and directing its activities in the discharge of its responsibilities. The defendant TOM SIMPSON, Conservation Officer of Duval County, is the officer of the department who has the duty and responsibility to enforce the provisions of the *State Act*, and to execute the policies promulgated by the department and its agent the Executive Director in the event of any alleged violation of the *State Act* in Duval County, Florida. A copy of the *State Act* is attached hereto as Exhibit 1.

20. Under the presumed authority thereof, the DEPARTMENT OF NATURAL RESOURCES, on December 19, 1970, adopted and promulgated administrative rule "oil spill" (Chapter 16 B-16) relating to terminal facility regulation, a copy of which is attached hereto as Exhibit 2; and further, on January 26, 1971, promulgated and adopted administrative rule "oil spill bill financial responsibility—vessels," (Chapter 16 B-16.08), a copy of which is attached as Exhibit 3.

21. The defendant Board, acting through its agents, officials, and employees has notified the public and the plaintiffs that it is presently implementing, administering and enforcing the provisions of the *State Act* and will implement, administer and enforce Rule 16B-16.08 After March 15, 1971; and plaintiffs allege that this will, in fact, be accomplished unless defendants are restrained by this Court. Defendants are presently issuing warning citations to plaintiffs and others similarly situated for alleged violations of the *State Act* and rule.

22. The *Federal Act*, together with pertinent prior Federal laws and subsequent rules and regulations adopted under the authority thereof, provides a comprehensive program having as its purpose the effective and efficient prevention and removal of the discharge of pollutants into any and all of the navigable waters of the United States or upon the adjoining shorelines or waters of the contiguous zone. Prevention measures, penalties, and clean-up by those responsible and by government action, as well as fines, cost and damage recovery procedures against the persons or companies responsible for illegal discharges, are provided. The full enforcement of this Federal plan is now underway, and it provides effective means for the prevention, clean-up and reimbursement incident to oil spills to which the *State Act* is addressed, except as hereinafter set forth. The Congress of the United States has, thus, preempted the field of preventive safeguards, notice, penalties, clean-up, and reimbursement made necessary by any pollution of navigable waters of Florida and of the United States through illegal discharges from ships or on-shore facilities. The *State Act* is, thus, a burden on interstate commerce in violation of the commerce clause of the Constitution of the United States (Article I, Section 8) and Article VI, Clause 2 of the United States Constitution, which declares the laws of the United States to be "the supreme law of the land."

23. The *State Act* embraces and authorizes a very broad program of operation by its direct terms, as well as under regulatory powers sought to be delegated. The defendants are required to establish 11 regional, coastal districts (one

embracing each of the 11 deep-water ports of Florida). Each district is authorized to have rules and regulations to meet its particular requirements, including a contingency plan of response, organization and equipment for handling emergency clean-up operations. Beyond this, State plans are required to include state-wide detail emergency operating procedures, operating and inspection requirements, requirements as to containment gear, procedures and methods for reporting a discharge, a port manager for each district having authority to board and inspect vessels for sea-worthiness. The State is further mandated to adopt procedures, methods, means and equipment to be used in clean-up, criteria and plans to meet oil pollution, requirements for minimum weather and sea conditions for permitting entry into any Florida port, and the requirement that prior to the entry the master shall report to the port manager any discharge, any mechanical difficulty and any denial of entry elsewhere during the vessel's current cruise. All of the above, by the terms of the *State Act*, are to be performed independently of, but in cooperation with, the Federal authorities. Beyond and in addition, every municipality and every county of the State is expressly authorized to pass ordinances or special acts covering the same subject matter (376.19, F.S.), with the exception that any such ordinance or special act shall not be in direct conflict with the *State Act*, and the same may not include a similar program of licensing and fees. The requirement on the plaintiffs to attempt to comply with this maze of local, county and state regulations is a burden on interstate commerce of catastrophic proportions and constitutes a taking of the plaintiffs' property and the destruction of plaintiffs' businesses. If the State of Florida may validly do what it is seeking to do in this field, then so may the 27 other coastal states, as well as every state bordering on navigable waters of the United States (which now includes Oklahoma).

24. The *State Act* duplicates and conflicts with many of the obligations of the prior *Federal Act* and regulations thereunder and sets up a new highly complicated, costly and unnecessary State bureaucracy, with the costs thereof required to be borne by the plaintiffs and others similarly situated, in

violation of plaintiffs' rights and privileges under the Fourteenth Amendment of the Constitution of the United States.

25. The absence of procedural and substantive due process of law, the excessive burdens imposed on interstate commerce, and maritime activity, the conflicts in operation of the *State Act* with Federal maritime law and with the *Federal Act*, all clearly appear from the following:

(a) Under the *Federal Act*, a means is provided for determining the responsibility for, and penalizing those guilty of, causing an unlawful discharge of pollutants. Procedural due process is effected by notice to any accused and an opportunity for him to be heard (Section 11(5)). No such notice or opportunity is provided under the *State Act*. In fact, State authorities are directed to move upon a finding that a discharge has occurred. The State authorities are further authorized to predetermine guilt by means available to them. Only after an accused has been "determined to be liable" by the State is he accorded the opportunity to raise one or more of the defenses (1) that the spill resulted from act of war; (2) by an act of government, state or federal; (3) by an act of God; or (4) by the act or omission of third parties. And these defenses may be raised only in the discretion of the State authorities as a "privilege conferred", not "as a right granted". Then is added the due process coup de gras: the administrative findings by the State are by the express term of the State act declared to be "conclusive".

(b) The *Federal Act* contemplates a hearing in court as a condition precedent to the assessment of a penalty unless the same is compromised or agreed to by the parties. No such hearing is provided by the *State Act*. The clean-up cost is alleged under the *Federal Act* to constitute a lien on the vessel which may be recovered in an action *in rem* in the Federal District Court; and the United States is further authorized to bring an action in a court of competent jurisdiction to recover its further costs when allowed. Under the terms of the *State Act*, the state has no obligation to adjudicate its claims in any court.

(c) Under the *State Act*, the fine for causing a spill may

be as much as \$50,000 per day, whereas under the *Federal Act*, the maximum is \$10,000 for each offense. The *Federal Act* requires as a condition precedent to the assessment of a penalty the finding that the discharge was knowingly made and that the owner or operator had been given notice and opportunity for hearing. The secretary is authorized to compromise the penalty and is provided reasonable standards to assist him in determining the proper amount of the fine. These include: (1) appropriateness; (2) size of the business of the operator; (3) the effect upon the owner; (4) his ability to remain in business; and (5) the gravity of the violation. No similar provisions are included in the State Law.

(d) The *Federal Act* affirmatively provides specific limitations on the amounts that those found responsible may be required to pay in reimbursement to the U. S. Government for costs expended in clean-up, unless the Government is able to show that the discharge "was the result of willful negligence or willful misconduct within the privity and knowledge of the owner." The *State Act* provides no limitation of liability whatsoever for costs expended for clean-up, environmental damage, or damage to third parties in direct conflict with the aforesaid provisions of the *Federal Act* and with the Federal Limitation of Liability Act (Act of March 3, 1851, Ch. 43, 9 Stat. 635, as amended, 46 U.S.C. §§ 181-189 (1964)) which provides inter alia that the liability of the owner of any vessel for any loss, damage, or injury by collision or for any act done without the privity or knowledge of such owner shall not exceed the amount or value of the interest of such owner in such vessel and her freight then pending.

(e) The *State Act* (Section 376.07(e)) provides that the State's "response team shall act *independently* of agencies of the Federal government but it is directed to cooperate with any Federal clean-up operation." The effect of this is to provide a double capability and a double operation separately manned and directed and is, at best, a plan which will result in enormous waste of State effort duplicating Federal action, and a squandering of the fees exacted from plaintiffs and the contributions made from the Florida treasury. At worst, it

brings the two (or more) government teams face to face in conflict to perform the same mission. A confusion of ultimate responsibility arises and the stage is set for law-men scapegoats for failure, which each government may appropriate as best fits its own political posture. Notwithstanding, and in conflict with these provisions of the *State Act* (376.07(e)), are the provisions of Section 376.09(2) thereof. Here, it is provided that if an unlawful discharge occurs "into or upon the navigable waters of the United States, the (State) department shall act in accordance with the national contingency plan (developed under the *Federal Act*) and the costs of removal incurred by the (State) department shall be paid in accordance with the applicable provisions of said law; that is, into the Federal treasury.

25. For many years, the plaintiffs have been engaged severally in their businesses and now meet all requirements of valid State and Federal law to pursue their businesses in Florida, except for the obligations imposed by the *State Act*. They and the other members of AWO have a long record of operating with full public responsibility. Nevertheless, the ships of plaintiffs will, pursuant to Rule 16 B-16.08, be refused entry to any port in Florida unless a certificate of financial responsibility has been issued to plaintiffs by the defendants. Such a certificate will not be issued unless the plaintiffs file with the defendants evidence of "financial responsibility" as required, based on the capacity of the terminal facility or tonnage of the vessel by either posting insurance, surety bonds, qualifying as a self-insurer, or in some other manner providing evidence of financial responsibility suitable to the defendants. The plaintiffs severally have made diligent efforts to obtain insurance and have been unsuccessful due to the unlimited scope of liability provided under the 1970 *State Act*. Such insurance has not been denied under the *Federal Act* because this law imposes specific limitations on the liability of the insureds. None of plaintiffs' ships have been refused entry because of not having this State certificate up to the time of the filing of this complaint, by some act of grace or indulgence by defendants, but plaintiffs have been warned that the defendants will

enforce to the fullest the *State Act* and its said rules, commencing on March 15, 1971.

26. In order for plaintiffs to continue to engage in interstate and international commerce utilizing Florida ports, it is necessary under the *State Act* that they jeopardize their entire assets to comply with the demands of this one state. And this potential liability gives no consideration to plaintiffs' excellent record in preventing spills, nor is it conditioned upon a finding of any negligence on the part of agents engaged in operating plaintiffs' vessels or licensed terminal facilities. The determination of liability is authorized to be made initially by a nonjudicial administrative State agency for the State benefit and for the benefit of third parties, without affording to the plaintiffs any opportunity to present defenses to show why they should not be held liable for the pollution complained of. This condition has resulted in plaintiffs' inability to induce brokers representing insurance and bonding companies to write bonds or insurance for plaintiffs as contemplated by the *State Act*.

27. The *State Act*, in most of its terms and requirements, is in violation of Article VI, Clause 2, of the United States Constitution, which declares that the laws of the United States are the supreme law of the land in areas properly subject to congressional control. The maritime activities of the plaintiffs in interstate and international commerce are within congressional control. The *Federal Act* and other prior federal statutes in the field, demonstrate that the Congress has in fact and in law exercised its constitutional power of preemption. Section 11(o)(1)(2) and (3) indicate a congressional intent to permit the states or local governments to take steps not in conflict with the Federal program. But by Section 11(k)(1), the power of the President to delegate is limited to Federal agencies. Further, under the Federal Contingency Plan (Exhibit 5), which was approved and promulgated prior to the enactment of the *State Act*, it is provided only that:

"State ~~and~~ local governments, industry groups, the academic community and others are encouraged to commit resources for response to a spill. Their specific commitments are outlined by the regional plans. Of

special relevance here is the organization of a standby scientific response capability." (Section 203.1)

There is nothing here which may be said to contemplate a parallel State enforcement program, the imposition of severe state burdens on interstate shipping or maritime activities, or any other State Act in conflict with the *Federal Act*.

28. The plaintiffs and others similarly situated have entered into contracts over a period of many years the terms of which require them to transport oil and other petroleum products, by-products and other products within the contemplation of the *State Act*, and the plaintiffs are now prohibited from complying with their obligations under these contracts by said law.

29. Each of plaintiffs is now standing in imminent danger of serious harm. Each is exposed to liability in unlimited amounts which may occur at any time for damages and costs arising from spills that its agents and employees did not cause, and for which the plaintiffs may not justly be held accountable. The peril is exacerbated by the limitations imposed by the *State Act* on plaintiffs' rights of defense, and the absence of limitations in said act on plaintiffs' liability for costs and damages. This condition has directly resulted in plaintiffs being unable to obtain the protection of liability insurance in the usual market place, notwithstanding their diligent efforts to procure such. Such insurance is essential to plaintiffs' stability, to its ability to obtain loans from banks, to market its stock, and otherwise operate and maintain a successful, viable business. Thus plaintiffs' businesses are now placed in serious jeopardy, and if these conditions are allowed to continue, the losses to plaintiffs will be irreparable.

30. *The State Act* (Chapter 376, Florida Statutes) is unconstitutional and void in that it violates the provisions of the United States Constitution in the following respects:

(a) The statute authorizes the State agency to make a finding of fault as to the plaintiffs or others similarly situated without affording to the plaintiffs an opportunity to be heard and, therefore, deprives the plaintiffs and others similarly situated of procedural due process of law as guaranteed by

the Fourteenth Amendment of the United States Constitution.

(b) The statute is unconstitutional and void in that the same constitutes a violation of Article III, Section 2, of the Constitution of the United States, which reserves the judicial power in all cases affecting admiralty and maritime jurisdiction to the United States courts.

(c) The statute deprives plaintiffs of substantive due process of law as guaranteed by the Fourteenth Amendment of the United States Constitution in that the same amounts to confiscation of plaintiffs' property, interferes with plaintiffs' right of contract, and constitutes a taking of plaintiffs' property without just compensation.

(d) The statute is unconstitutional and void in that it attempts to cover an area preempted by the Federal Government and is in violation of the commerce clause of the United States Constitution.

(e) The statute is unconstitutional and void in that the same constitutes an unreasonable burden on interstate commerce in violation of the United States Constitution as it attempts to regulate and burden maritime activities in interstate and international commerce.

(f) The statute deprives plaintiffs of the right of equal protection of the laws as guaranteed by the Fourteenth Amendment of the Federal Constitution in that the same seeks to regulate named materials when carried as cargo but does not regulate the transportation of the same materials when carried in the same or larger quantities other than as cargo.

(g) The statute is unconstitutional and void in that it violates Article VI, Clause 2, of the United States Constitution, which declares that constitution, treaties, and laws of the United States, constitute the supreme law of the land.

31. Plaintiffs have no adequate remedy at law to prevent irreparable harm except by way of injunction to restrain the defendants in the enforcement, execution and administration of the *State Act*.

WHEREFORE, Plaintiffs, pursuant to the provisions of Sections 2281 and 2284 of Title 28, United States Code, pray

that this Court:

(1) Convene a statutory court of three judges for the purpose of hearing and determining this cause at the earliest practicable date;

(2) Adjudge and declare to be in violation of the Constitution of the United States, and therefore void, the whole or separable parts of Chapter 70-224, Laws of Florida, 1970 (Chapter 376, Florida Statutes);

(3) Issue a preliminary and permanent injunction restraining and enjoining the defendants from enforcing, executing, administering or in any manner giving effect to the provisions of Chapter 70-224, Laws of Florida, 1970 (Chapter 376, Florida Statutes), which are adjudged and declared to be in violation of the Constitution of the United States;

(4) Issue a temporary restraining order pursuant to Section 2284(3) of Title 28, United States Code, restraining the defendants from enforcing, executing or administering the whole or separable parts of Chapter 70-224, Laws of Florida, 1970 (Chapter 376, Florida Statutes);

(5) Grant plaintiffs' costs and disbursements and grant plaintiffs such other and further relief as may be meet and just in the premises.

LEROY COLLINS
of Counsel

JOSEPH C. JACOBS
and

SANDERS SAULS
of the law firm of
Ervin, Pennington, Varn & Jacobs
Post Office Box 1170
Tallahassee, Florida 32302

Attorneys for Plaintiffs

(Jurats omitted in printing)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA,
JACKSONVILLE DIVISION

THE AMERICAN WATERWAYS OPERATORS, et al.,
PLAINTIFFS,

and

AMERICAN INSTITUTE OF MERCHANT SHIPPING
ASSURANCEFORENINGEN GARD, et al., and their respective
members,

INTERVENING PLAINTIFFS,

vs.

HON. REUBIN O'D. ASKEW, et al., DEFENDANTS.

The Complaint of the American Institute of Merchant Shipping, Assuranceforeningen Gard, Assuranceforeningen Skuld, The Britannia Steam Ship Insurance Association, Limited, The Japan Ship Owners Mutual Protecting and Indemnity Association, The Liverpool and London Steam Ship Protection and Indemnity Association, Limited, The London Steamship Owners' Mutual Insurance Association Limited, Newcastle Protection and Indemnity Association, The North of England Protecting & Indemnity Association Limited, The Standard Steamship Owners' Protection and Indemnity Association Limited, The Standard Steamship Owners' Protection & Indemnity Association (Bermuda) Limited, The Steamship Mutual Underwriting Association Limited, Sunderland Steamship Protecting & Indemnity Association, Sveriges Angfartygs Assuransforening, The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited, The West of England Ship Owners Mutual Protection and Indemnity Association (Luxembourg) and their respective members, by their attorneys, Fowler, White, Gillen, Humkey, Kinney & Boggs; Haight, Gardner, Poor & Havens, and Healy & Baillie, respectfully alleges, on information and belief, as follows:

PARTIES

1. Intervening Plaintiff The American Institute of Merchant Shipping ("the Institute") is a non-profit corporation organized under and existing pursuant to the laws of the District of Columbia and is the national trade association of the American steamship industry. It is composed of 35 American companies which own and operate approximately 520 United States flag, ocean-going vessels of all types, engaged in the domestic and foreign trades. Many of its members have scheduled calls of their vessels at Florida ports and others may wish to serve such ports in the future. The Institute and its members therefore have a substantial interest in the Florida Oil Spill and Pollution Control Act (Ch. 70-244, Laws of Florida, 1970 ("the Florida Act")) and the Regulations issued thereunder.

2. Intervening Plaintiffs Assuranceforeningen Gard and Assuranceforeningen Skuld are corporations organized under and existing pursuant to the laws of the Kingdom of Norway.

3. Intervening Plaintiffs the Britannia Steam Ship Insurance Association, Limited; the Liverpool and London Steam Ship Protection and Indemnity Association, Limited; The London Steam-Ship Owners' Mutual Insurance Association Limited; Newcastle Protection and Indemnity Association; The North of England Protecting & Indemnity Association Limited; The Standard Steamship Owners' Protection and Indemnity Association Limited; and The Steamship Mutual Underwriting Association Limited; and Sunderland Steamship Protecting & Indemnity Association are corporations organized under and existing pursuant to the laws of the United Kingdom of Great Britain and Northern Ireland.

4. The Japan Ship Owners Mutual Protecting and Indemnity Association is a corporation organized under and existing pursuant to the laws of the Empire of Japan.

5. The Standard Steamship Owners' Protection & Indemnity Association (Bermuda) Limited and The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited, are corporations organized under and existing pursuant to the Laws of Bermuda.

6. Sveriges Angfartygs Assuransforening is a corporation organized under and existing pursuant to the laws of the Kingdom of Sweden.

7. The West of England Ship Owners Mutual Protection and Indemnity Association (Luxembourg) is a corporation organized under and existing pursuant to the laws of the Grand Duchy of Luxembourg.

8. The Associations described in Paragraphs "2" to "7", inclusive ("the Association"), are composed of owners and operators of approximately three quarters of the world's ocean-going vessel tonnage, flying the flags of almost every maritime country, including approximately 4,000,000 tons under American flag. A substantial number of vessels owned or operated by members of the Associations have scheduled calls of their vessels at Florida ports, and others may wish to serve such ports in the future. The members of each of the Associations mutually insure one another on the indemnity principle, through the medium of their particular Association, against liabilities of numerous types arising out of the ownership and operation of their vessels, including liabilities for pollution damage caused by the discharge of oil and other substances from their vessels. The Associations and their respective members therefore have a substantial interest in the Florida Act and Regulations.

9. Defendants and their respective positions and responsibilities are described in Paragraphs "19", "20" and "21" of the original complaint in this action, filed on behalf of original Plaintiffs The American Waterways Operators, Inc., *et al.* on March 8, 1971, the allegations of which paragraphs are incorporated herein with the same force and effect as though herein set forth at length.

10. Defendants are citizens of the State of Florida.

JURISDICTION

11. This Honorable Court has jurisdiction of this cause by virtue of Title 28 U.S.C. §1331 (1964), and under the following provisions of the Constitution; Article I, Section 8, Clause 3 (Regulation of Commerce); Article I, Section 9,

Clause 18 (Necessary and Proper Laws); Article III, Section 2, Clause 3 (Admiralty); Article VI, Clause 2 (Supreme Law of the Land); Fifth Amendment (Due Process Clause); Fourteenth Amendment (Due Process and Equal Protection Clauses), and precepts derived from the Constitution of the United States as a whole. The amount in controversy, exclusive of interest and costs, exceeds the sum of \$10,000. This Honorable Court therefore has federal question jurisdiction of this action under 28 U.S.C. §1331 (1964). All named plaintiffs in this action are foreign corporations; all defendants are citizens of Florida and the amount in controversy, exclusive of interest and costs, exceeds \$10,000. This Honorable Court therefore has diversity jurisdiction under Title 28 U.S.C. §1332 (1964).

AS AND FOR A FIRST CAUSE OF ACTION:

12. Article III, Section 2 of the Constitution extends the judicial power of the United States to all cases of admiralty and maritime jurisdiction, and Article I, Section 8, Clause 18, provides that Congress shall have power to make all laws which shall be necessary and proper for carrying into execution all powers vested by the Constitution in the Government of the United States, or in any Department of Officer thereof.

13. By reason of the aforesaid provisions, Congress is vested with paramount power to fix and determine the maritime law, and where Congress has not enacted legislation, the Federal Judiciary has the power to define the general maritime law which is to prevail throughout the United States. Congress has in fact enacted a comprehensive and detailed body of statutes relating to marine oil pollution and regulations have been duly issued by Federal agencies thereunder.

14. In view of the need for a nationally uniform maritime law recognized by the Constitutional grant, power to enact legislation such as the Florida Act does not exist in the States and is not delegable to them by the Congress.

15. Contrary to the aforesaid provisions of the Consti-

tution, the Legislature of the State of Florida has nevertheless enacted the Florida Oil Spill/Prevention and Pollution Control Act (Chapter 70-244 of the Laws of the State of Florida), and the Florida Department of Natural Resources has published Regulations thereunder.

16. The Florida Act and Regulations purport, among other things:

a. To require the establishment of evidence of financial responsibility in respect of vessels carrying certain cargoes to Florida ports, on pain of withholding permission from said vessels to enter Florida ports;

b. To require the maintenance on board vessels carrying certain cargoes of such containment gear as may be required by the Florida Department of Natural Resources, with a crew trained in the use of such gear;

c. To set up standards of liability for the maritime tort of marine pollution differing from those of the general maritime law and applicable federal statutes and to impose absolute liability, regardless of fault, for damages resulting from discharges of oil and other substances from vessels;

d. To deny to owners of vessels the right to limit their liability for damage resulting from such discharges; and

e. To require a grant of permission of the particular agency of the State of Florida having jurisdiction thereof in order for any person to deal with derelict vessels, and to empower the State on its own initiative to control the disposition to be made of certain derelict vessels.

f. To deprive the United States District Courts of the cognizance of all cases of admiralty and maritime jurisdiction which they have by virtue of the Admiralty Clause of the Constitution (Article III, Section 2, Clause 3) and Title 28, U.S.C. § 1333, and instead to vest in the Florida Department of Natural Resources the exclusive power to determine liability for marine pollution damages, purporting to give to the said Department the absolute discretion to confer as a privilege, and not as a right, a waiver of liability for reimbursement for such

damages if it finds, after hearing, that the occurrence giving rise thereto was the result of an act of war, act of Government, act of God, or an act or omission of a third party.

g. To empower the Florida Department of Natural Resources to adopt, amend, repeal and enforce regulations relating to oil spills or discharges, or the spills or discharges of other pollutants into the waters of Florida, or onto the coasts of that State, covering, among other things, operation and inspection requirements for vessels; procedures and methods of reporting discharges and other occurrences which the Florida Act purports to prohibit; procedures, methods, means and equipment to be used in the removal of pollutants; requirements for minimum weather and sea conditions for permitting vessels to enter ports and for the safety and operation of vessels, and requiring that, prior to being granted entry into any port of Florida, the Master must report any discharges of oil or other pollutants his vessel has had since leaving her last port, any mechanical problem creating the possibility of a spill, and any denial of entry into any port during the vessels current voyage.

17. The Florida Act and Regulations, insofar as they deal with the aforesaid matters and others similar thereto, are null, void and of no effect, by reason of the Constitutional reservation to the Congress of the paramount power to enact legislation governing the movement of vessels in waters within the admiralty and maritime jurisdiction of the United States, particularly when engaged in international or interstate commerce, and the power of the Federal Judiciary to define the maritime law which, in the absence of Congressional legislation, is to prevail throughout the United States.

AS AND FOR A SECOND CAUSE OF ACTION:

18. The Constitution provides, in Article I, Section 8, Clause 3, that the Congress shall have power to regulate commerce with foreign nations and among the several States.

19. Pursuant to such constitutional authority, the Congress has enacted a comprehensive and detailed body of statutes, and Federal regulations have been duly issued pursuant to certain of those and other federal statutes.

20. The aforesaid federal statutes and regulations provide, among other things:

- a. For a national policy for the prevention, control and abatement of water pollution.
- b. For the prohibition of discharges of oil into or upon the navigable waters of the United States, their adjacent shorelines, or the waters of the contiguous zone in harmful quantities, consistent with maritime safety and with marine and navigation laws and regulations and applicable water quality standards;
- c. For the definition of "harmful discharge" by Presidential Regulation;
- d. For fines and/or imprisonment of persons in charge of vessels, or on- or offshore facilities, who fail to notify the appropriate agency of the Federal Government in case of harmful discharges from their vessels or facilities, or who knowingly allow such harmful discharges;
- e. For promulgation of a National Contingency Plan for the removal of oil discharges;
- f. For radical emergency measures, including destruction of vessels discharging or about to discharge large quantities of oil in or upon the navigable waters of the United States;
- g. For action by United States Attorneys to abate actual or threatened discharges of oil imposing imminent and substantial threats to the public health or welfare of the United States;
- h. For standards of proof by which owners or operators of vessels shall be found liable for discharges of oil, the amount of potential liability therefor, and the procedure for recovery of the cost of removal;
- i. For standards of proof which owners or operators of vessels must meet in order to establish liability of third parties for discharges;
- j. For preservation of vessel owners' or operators'

rights against third parties;

k. For recovery by vessel owners or operators, in proper cases, of the cost of removing discharged oil;

l. For the issuance by the President of rules and regulations consistent with the National Contingency Plan;

m. For civil penalties for failure to comply with said regulations;

n. For the establishment and maintenance by owners or operators of vessels of evidence of financial responsibility to meet potential liabilities for the cost of removal of oil discharges with the right of direct legal action against insurers or other persons providing such evidence of financial responsibility;

o. For cooperation by all federal agencies in complying with applicable water quality standards; and

p. For preventing the obstruction of navigable waters by disabled vessels, and for marking and removing vessels moored, wrecked or sunk so as to form such obstructions.

21. The aforesaid federal statutory provisions, together with the general maritime law, applicable to the plaintiff members of the Institute and of the Associations while their vessels engage in interstate or international maritime commerce with ports of Florida and other ports of the United States, and controlling the liabilities of said members from time to time arising, in respect of which certain of plaintiff Associations are by contract with their respective members required to provide indemnity, regulate commerce with foreign nations and among the several States.

22. Contrary to the aforesaid Constitutional and statutory provisions, the State of Florida has nevertheless enacted the Florida Oil Spill/Prevention and Pollution Control Act (Chapter 70-244 of the Laws of the State of Florida), and has published Regulations thereunder.

23. The aforesaid Intervening Plaintiffs repeat and reallege each and every allegation contained in Paragraph "16" of this complaint, with the same force and effect as herein set forth at length.

24. The Florida Act and Regulations purport to impose other and multiplicitous requirements, standards, penalties and duties in addition to and/or duplicative of those previously contained in federal statutes and regulations.

25. The Florida Act and regulations impose unreasonable burdens upon international and interstate maritime commerce, and are therefore null, void and of no effect under the Commerce Clause of the Constitution.

AS AND FOR A THIRD CAUSE OF ACTION:

26. The Constitution provides, in Article VI, Clause 2, that the Constitution, and the laws of the United States which shall be made in pursuance thereof, shall be the Supreme Law of the Land; and that the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.

27. The aforesaid Intervening Plaintiffs repeat and reallege each and every allegation contained in Paragraphs "19" and "20" of this complaint with the same force and effect as if herein set forth at length.

28. These aforesaid statutes, and the regulations issued thereunder, leave no room for duplicative state legislation. Further, the federal interest in the field of foreign maritime commerce is so dominant, and the need for uniformity so great in view of the immense potential for commercial disruption implicit in the possible enactment of twenty-nine differing and/or contradictory state regulatory schemes by the coastal States (Alabama, Alaska, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Virginia, Washington and Wisconsin), that the federal statutes and regulations already governing the movement of vessels in international and interstate maritime commerce must be seen as fully occupying the field, to the exclusion of disparate and burdensome state regulatory schemes allegedly operating in the same field, on the same

persons, for the same ends.

29. Existing federal legislation and regulations governing the movement of vessels in international and interstate maritime commerce preempt that legislative field as the Supreme Law of the Land, pursuant to Article VI, Clause 2 of the Constitution, wherefore the Florida Act and regulations, insofar as they impinge on that field, are null, void and of no effect.

AS AND FOR A FOURTH CAUSE OF ACTION:

30. The Constitution provides, in the Fifth Amendment thereto, that no person shall be deprived of property without due process of law; and, in the Fourteenth Amendment thereto, that no state shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

31. The aforesaid Intervening Plaintiffs repeat and reallege each and every allegation contained in Paragraph "16" of this complaint with the same force and effect as if herein set forth at length.

32. The Florida Act and Regulations further purport to provide for a civil penalty of not more than \$50,000 for each day any violation of the provisions of the Florida Act or Regulations is found to continue; to remove from state and federal courts altogether jurisdiction to hear and determine questions relating to liability for civil penalties, costs of removal and damages in respect of marine oil pollution; and to create a rule of absolute liability, operating only in favor of the State of Florida and other pollution damage plaintiffs but not in favor of innocent vessel owners or operators as third-party plaintiffs, where a discharge is caused by negligent or willful acts of third party defendants, with the result that such innocent owners or operators would, if the Florida Act and Regulations were upheld, be required to respond to the State of Florida and other pollution damage plaintiffs for such pollution damage, with no remedy against the culpable parties.

33. Said provisions, with others to be briefed to this

Honorable Court, have no reasonable basis in law or fact to support their arbitrary disruption and/or deprivation of intervening plaintiffs' trade and property rights.

34. Said provisions bear no reasonable relation to the goals sought to be achieved by the Florida Act, and discriminate arbitrarily between the State of Florida and other pollution claimants, on the one hand and personal injury, collision and other maritime claimants, on the other hand.

35. Said provisions deprive Intervening Plaintiffs of trade and property rights without due process or equal protection of the law and are therefore null, void and of no effect under the fifth and Fourteenth Amendments to the Constitution.

WHEREFORE, Intervening Plaintiffs the American Institute of Merchant Shipping, Assuranceforeningen Gard, *et al.* respectfully pray that this Honorable Court will hand down its judgment:

a. Declaring the Oil Spill Prevention and Pollution Control Act (Chapter 70-244 of the Laws of the State of Florida) null, void, and of no effect as said Act purports to bear on the movement of vessels engaged in maritime commerce, by reason of the unconstitutionality of said Act;

b. Permanently enjoining defendants in their official capacities, and all others who may thereafter succeed to said official capacities, from maintaining, upholding, implementing and/or enforcing any provision of said Act, or any Regulations issued thereunder, as said Act purports to bear on the movement of vessels engaged in maritime commerce; and

c. Granting such further, other or different relief as to this Honorable Court may appear just in the cause.

Yours, etc.,

FOWLER, WHITE, GILLEN, HUMKEY,
KINNEY & BOGGS (P.A.)

BY /s/ Dewey Villareal
A Member of the Firm

Office and P.O. Address
P.O. Box 1438
Tampa, Florida 33601

HAIGHT, GARDNER, POOR & HAVENS

BY /s/ Gordon W. Paulsen
A Member of the Firm

Office and P.O. Address
80 Broad Street
New York, N.Y. 10004

HEALY & BAILLIE

BY /s/ Nicholas J. Healy
A Member of the Firm

Office and P.O. Address
29 Broadway
New York, N.Y. 10006
212-WH 3-3980

Attorneys for Intervening Plaintiffs
American Institute of Merchant
Shipping, Assuranceforeningen Gard,
et al.,

(Certificate of service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

THE AMERICAN WATERWAYS OPERATORS, INC., et al.,
PLAINTIFFS,

and

SUWANNEE STEAMSHIP CO., et al., and their respective
members,

INTERVENING PLAINTIFFS,

vs.

REUBIN O'D, ASKEW et al.,

DEFENDANTS.

ANSWER TO PLAINTIFFS' COMPLAINT

Defendants answer Plaintiffs' complaint and state:

1. Defendants are without knowledge of assertions of paragraph 1 of the Complaint and neither affirm nor deny same.

2. Defendants deny paragraph 2 of the Complaint.

3. Defendants are without knowledge of assertions of paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18 of the Complaint and neither affirm nor deny same.

4. Defendants admit allegations of paragraph 19 and 20 of the complaint.

5. Defendants admit allegations of paragraph 21 of the Complaint.

6. Defendants deny allegations of paragraph 22 of the Complaint.

7. Defendants deny the 8th sentence of paragraph 23 of said Complaint.

8. Defendants deny allegations of paragraph 24 of the Complaint.

9. Defendants deny allegations of paragraph 25 of the Complaint.

10. Defendants deny allegations of paragraph 25 (a) of the

Complaint.

11. Defendants deny allegations of paragraph 25 (b) of the Complaint.

12. Defendants are without knowledge of allegations of paragraphs 25 (c) and 25 (d) of the Complaint and neither affirm nor deny same.

13. Defendants deny allegations of paragraph 25 (e) of the Complaint.

14. Defendants are without knowledge of assertions of paragraph 26 beginning on page 11 of the Complaint (mistakenly numbered "25").

15. Defendants deny allegations of paragraph "26" of the Complaint.

16. Defendants deny allegations of paragraph "27" of the Complaint.

17. Defendants deny allegations of paragraph "28" of the Complaint.

18. Defendants deny allegations of paragraph "29" of the Complaint.

19. Defendants deny allegations of paragraph "30" and of each and every sub-paragraph thereof of the Complaint.

20. Defendants deny allegation of paragraph "31" of the complaint.

WHEREFORE, Defendants pray that this Court dismiss Plaintiffs' Complaint with prejudice with costs assessable against Plaintiffs.

**ANSWER TO COMPLAINT OF INTERVENORS
SUWANNEE STEAMSHIP CO., COMMODORES POINT
TERMINAL CORPORATION, AND AMERICAN INSTITUTE
OF MERCHANT SHIPPING, et al.**

Defendants answer the Complaint of these Intervenor (hereinafter referred to as "Suwannee Complaint") and state:

21. Defendants are without knowledge of assertions of paragraph 1 of the Suwannee Complaint and neither admit nor deny same.

22. Defendants are without knowledge of assertions of paragraph 2 of the Suwannee Complaint and neither admit

nor deny same.

23. Defendants admit paragraphs 3, 4, and 5 of the Suwannee Complaint.

24. Defendants deny allegations of paragraph 6 of the Suwannee Complaint.

25. Defendants deny assertions of paragraph 7 and each and every subparagraph thereof of the Suwannee Complaint.

WHEREFORE, Defendants pray this Court to dismiss the Suwannee Complaint with prejudice with costs assessable against these Intervenor.

ANSWER TO COMPLAINT OF INTERVENORS AMERICAN INSTITUTE OF MERCHANT SHIPPING, et al.

Defendants answer the Complaint of these Intervenor (hereinafter referred to as "Institute Complaint") and state:

26. Defendants are without knowledge of assertions of paragraph 1 through 8, inclusive, of the Institute Complaint and neither admit nor deny same.

27. Defendants admit allegations of paragraphs 9 and 10 of the Institute Complaint.

28. As to paragraph 11 of the Institute Complaint, Defendants admit that this Court has jurisdiction, but deny appropriateness of the specific constitutional provisions set forth therein.

29. Defendants admit allegations of paragraph 12 of the Institute Complaint.

30. Defendants admit the first sentence of paragraph 13 of the Institute Complaint, but deny allegations in the second sentence thereof to the extent that the *Federal Act* referred to is asserted to be of such a comprehensive nature as to foreclose state legislation in the field of marine oil-spill pollution control.

31. Defendants deny allegations of paragraph 14 of the Institute Complaint.

32. Defendants deny paragraph 15 of the Institute Complaint insofar as it asserts that the Florida Act is contrary to the Constitution.

33. Defendants admit paragraphs 16 a and 16 b of the

Institute Complaint.

34. Defendants deny paragraph 16 c of the Institute Complaint insofar as it purports to limit pollution of state waters to the category of a maritime tort.

35. Defendants admit paragraph 16 d of the Institute Complaint.

36. Defendants deny paragraph 16 e of the Institute Complaint.

37. Defendants deny paragraph 16 f of the Institute Complaint.

38. Defendants admit allegations of paragraph 16 g of the Institute Complaint.

39. Defendants deny allegations of paragraph 17 of the Institute Complaint.

40. Defendants admit paragraph 18 of the Institute Complaint.

41. Defendants deny allegations of paragraph 19 insofar as they assert the *Federal Act* to be so comprehensive as to foreclose the State from legislating in the field of oil-spill pollution control.

42. Defendants are without knowledge of and therefore neither admit nor deny allegations related to the *Federal Act* contained in paragraph 20 and all subdivisions thereof, except insofar as such allegations attempt to assert or may be interpreted as asserting Federal preemption in the field of oil-spill pollution control.

43. Defendants deny assertions of paragraph 21 of the Institute Complaint insofar as it purports to allege that the *Federal Act* controls liability of plaintiffs while in Florida waters, and that the *Federal Act* regulates commerce with foreign nations and between the several states.

44. Defendants deny assertions of paragraph 22 of the Institute Complaint insofar as it alleges the Florida Act to be contrary to the Constitution.

45. As to paragraph 23 of the Institute Complaint, Defendants repeat their response to paragraph 16 and all subparagraphs thereof, which response is contained in Answer paragraphs 33 through 38, inclusive, hereinabove set out.

46. Defendants deny paragraphs 24 and 25 of the Institute

Complaint.

47. Defendants admit paragraph 26 of the Institute Complaint.

48. As to paragraph 27 of the Institute Complaint, Defendants repeat their responses to paragraphs 19 and 20 and all subparagraphs thereof contained in Answer paragraphs 41 and 42 hereinabove set out.

49. Defendants deny the allegations of paragraphs 28 and 29 of the Institute Complaint.

50. Defendants admit paragraph 30 of the Institute Complaint.

51. As to paragraph 31 of the Institute Complaint, Defendants repeat their response to paragraph 16 and all subparagraphs thereof which response is contained in Answer paragraphs 33 through 38, inclusive, hereinabove set out.

52. Defendants deny allegations of paragraphs 32 through 35, inclusive, of the Institute Complaint.

WHEREFORE, Defendants pray the Court to dismiss the Institute Complaint with prejudice with costs assessable to these Intervenor.

COUNTERCLAIM

1. This counterclaim is for treble damages and injunctive relief arising under the antitrust laws of the United States. 15 U.S.C. § 1, *et seq.*

2. Counterclaimant, the State of Florida (hereinafter the "State"), is a sovereign state of the United States, and has sustained and will sustain damages as a result of the combination and conspiracy in violation of the antitrust laws herein alleged. The sovereign power of the State is invoked by Defendant/Counterclaimant Robert L. Shevin as Attorney General of the State of Florida.

3. Counterclaimant also brings this action in its capacity as *parens patriae*, trustee, guardian and representative on behalf of the people of the State in that it has an obligation to maintain, protect and promote the health and welfare of its people.

4. The damage and injury done to the people of the State

as a result of the combination and conspiracy alleged herein transcends the injury sustained by them individually, and adversely affects the economy and prosperity of the State and the health and welfare of its citizens.

5. Counterclaimant also brings this action pursuant to Rule 23 of the Federal Rules of Civil Procedure, as representative of the class consisting of all public and private entities and persons injured and likely to be injured by the effects of the combination and conspiracy herein alleged. Said members of the class are so numerous that joinder of all members is impracticable. The rights of the members of the class involve common questions of law and fact. The claims of the counterclaimant are typical to those of the class. Counterclaimant will fairly and adequately protect the interests of the class. The questions of law and fact common to members of the class predominate over any questions affecting only individual members. This class action is superior to other methods for fair and efficient adjudication of the controversy herein described.

6. This counterclaim is brought against the following named associations and each of their respective members, all of whom have intervened as parties plaintiff in this cause:

AMERICAN INSTITUTE OF MERCHANT SHIPPING, ASSURANCEFORENINGEN GARD, ASSURANCEFORENINGEN SKULD, THE BRITANNIA STEAM SHIP INSURANCE ASSOCIATION, LIMITED, THE JAPAN SHIP OWNERS MUTUAL PROTECTING AND INDEMNITY ASSOCIATION, THE LIVERPOOL AND LONDON STEAM SHIP PROTECTION AND INDEMNITY ASSOCIATION, LIMITED, THE LONDON STEAMSHIP OWNERS' MUTUAL INSURANCE ASSOCIATION LIMITED, NEWCASTLE PROTECTION AND INDEMNITY ASSOCIATION, THE NORTH OF ENGLAND PROTECTING & INDEMNITY ASSOCIATION LIMITED, THE STANDARD STEAMSHIP OWNERS' PROTECTION AND INDEMNITY ASSOCIATION LIMITED, THE STANDARD STEAMSHIP OWNERS' PROTECTION & INDEMNITY ASSOCIATION (BERMUDA) LIMITED, THE STEAMSHIP

MUTUAL UNDERWRITING ASSOCIATION, LIMITED, SUNDERLAND STEAMSHIP PROTECTING & INDEMNITY ASSOCIATION, SVERIGES ANGFARTYGS ASSURANSFORENING, THE UNITED KINGDOM MUTUAL STEAM SHIP ASSURANCE ASSOCIATION (BERMUDA) LIMITED, THE WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG), and their respective members.

The above-named counterclaim defendant denominated American Institute of Merchant Shipping is the national trade association of the American Steamship industry. Other of the above-named counterclaim defendants, commonly known as "P and I Clubs," are British, Japanese, Norwegian, Swedish, Bermudian and Luxembourgian associations.

7. Each of the counterclaim defendants is found or transacts business in the Middle District of Florida, the unlawful activities done pursuant to the combination and conspiracy herein alleged were carried out, in part, within the Middle District of Florida, and the interstate and foreign trade and commerce hereinafter described is carried on in part within the Middle District of Florida.

CO-CONSPIRATORS

8. Various other persons, firms, and corporations not made counterclaim defendants herein have participated as co-conspirators with the counterclaim defendants in the offense charged in this complaint and have performed acts and made statements in furtherance thereof.

NATURE OF TRADE AND COMMERCE

9. The carriage of goods by water is an integral and important part of the interstate and foreign commerce of the United States and State of Florida. In 1969, waterborne exports from the United States amounted to approximately \$20 billion and waterborne imports amounted to approximately \$21.6 billion. The waterborne exports of products

from and imports to Florida ports are of substantial significance to the trade of individual businesses and to the general economy of the state. For example, in 1968 imports and exports from major Florida ports amounted to the following:

	Thousands of Short Tons	
	Imports	Exports
Jacksonville Harbor	3,650	1,540
Port Everglade Harbor	2,205	206
Miami Harbor	1,298	302
Tampa Harbor	2,050	10,525

Waterborne coastal trade is also significant to the above ports. In 1968, shipments and receipts for major Florida ports were as follows:

	Thousands of Short Tons	
	Receipts	Shipments
Jacksonville Harbor	3,854	515
Port Everglades Harbor	5,306	262
Miami Harbor	315	183
Tampa Harbor	10,463	3,383

10. Petroleum and petroleum products are of vital importance to the economy of the United States and the State of Florida particularly for fuel purposes. In 1968, consumption of petroleum and petroleum products in the United States amounted to about 24,880 trillion British Thermal Units or about 39.5% of all mineral energy and electricity consumption. However, the United States has for more than a decade produced less than its needs of petroleum and has been a net importer of petroleum and petroleum products. In 1968 U.S. production of petroleum and petroleum products amounted to about 19,510 trillion British Thermal Units. In 1968, U. S. imports of crude petroleum were 472 million barrels and imports of refined products were 567 million barrels, while exports were two million barrels of crude and 83 million barrels of refined. Accordingly, petroleum imports are vital for the functioning of the economy.

11. The counterclaim defendant P and I clubs are mutual associations formed by shipowners in order to provide themselves with Marine Protection and Indemnity Insurance on the indemnity principle. The associations, being fully mutual, represent the interests of their individual shipowner members equally with the interests of the associations themselves. Collectively, they insure approximately three quarters of the world's ocean-going vessel tonnage against liabilities arising out of the operation of their members' vessels, including oil pollution liabilities. The counterclaim defendant American Institute of Merchant shipping is composed of 35 United States companies which own and operate about 520 U.S.-flag, ocean-going vessels of all types, engaged in the domestic and foreign trades. Accordingly, the operations of the members of the American Institute of Merchant Shipping and the P and I clubs represent a significant factor in the foreign and interstate waterborne commerce described above, and in the importing of oil to the United States and State of Florida.

CONSPIRACY CHARGED

12. Beginning at least as early as 1970 and continuing thereafter up to and including the date of the filing of this counterclaim, counterclaim defendants and their co-conspirators have been engaged in a combination and conspiracy in restraint of foreign and interstate trade and commerce in shipping, the carriage of waterborne freight and the insurance and reinsurance of ships and shipping in violation of the anti-trust laws of the United States, 15 U.S.C. § 1 *et seq.*

13. Said combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among counterclaim defendants and their co-conspirators, the substantial terms of which have been:

(a) To threaten to impair, lessen or halt the voyages of ships to the ports of Florida.

(b) To halt the voyages of ships bound for Florida ports, and to divert ships bound for Florida ports to

other ports.

(c) To refuse to provide insurance and reinsurance covering ships bound for Florida ports.

14. For the purpose of forming and effectuating the aforesaid combination and conspiracy, counterclaim defendants and their co-conspirators have:

(a) Publicly announced that under stated conditions there would be no future sailings to Florida ports, including public announcements made during the course of hearings in this cause;

(b) Diverted ships bound for Florida ports to ports outside the state;

(c) Publicly announced their refusal to provide insurance for ships bound for Florida ports, and refused to provide such insurance.

EFFECTS

15. The aforesaid combination and conspiracy has had, among other things, the following effects:

(a) Ships bound for Florida ports have been diverted to other ports;

(b) Shipments required by importers have been delayed and had to be shipped overland at greater expense from ports outside the State of Florida;

(c) Florida port authority fees have been lost.

(d) The free flow of interstate and foreign trade and commerce by water carrier has been impeded.

16. By reason of the foregoing, the state and other members of the counterclaimant class have been and will continue to be injured in their respective businesses and property in an amount not yet ascertained. The conspiracy and combination herein alleged has resulted in a continuing course of conduct by the counterclaim defendants, the effect of which has been and will continue to be to increase the injury to the State and other members of the counterclaimant class while such course of conduct continues, and counterclaimant hereby seeks leave of the Court to amend or

supplement this counterclaim from time to time to specify the injury to business and property which shall have been incurred.

PRAYER

WHEREFORE, counterclaimant prays:

1. That the Court adjudge and decree that counterclaim defendants, and each of them, have engaged in an unlawful combination and conspiracy in violation of Section 1 of the Sherman Act.

2. That the State and other members of the counterclaim class recover threefold the damages determined to have been sustained by each of them respectively, and that joint and several judgments be entered herein against counterclaim defendants, and each of them, for the amounts determined.

3. That each of the counterclaim defendants, its successors, assignees, subsidiaries, and transferees, and the respective officers, directors, agents and employees, and all other persons action or claiming to act on behalf thereof or in concert therewith be perpetually enjoined and restrained from, in any manner, directly or indirectly, continuing, maintaining, or renewing the aforesaid combination and conspiracy and from engaging in any other combination, conspiracy, agreement, understanding, or concert of action, adopting or following any practice, plan, program, or design having a similar purpose or effect.

4. That this Court grant such other, further, and different relief as may be deemed just and proper.

5. That counterclaimant and members of the class recover the costs of this suit, together with a reasonable attorney's fee.

ROBERT L. SHEVIN
Attorney General

/s/DANIEL S. DEARING
Chief Trial Counsel

Attorneys for Defendants
and Counterclaimants
The Capitol
Department of Legal Affairs
Tallahassee, Florida 32304

(Certificate of service omitted in printing)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 71-156-Civ-J

THE AMERICAN WATERWAYS OPERATIONS, INC., et al.,
PLAINTIFFS

and

SUWANNEE STEAMSHIP CO., et al.,
INTERVENING PLAINTIFFS,

vs.

REUBIN O'D. ASKEW, et al.

DEFENDANTS

MEMORANDUM OPINION
AND FINAL JUDGMENT

Before, RONEY, Circuit Judge, and SCOTT and TJOFLAT,
District Judges.

TJOFLAT, District Judge:

During the 1970 session the Florida Legislature passed the "Oil Spill Prevention and Pollution Control Act"¹ (hereinafter called the "Florida Act") in an attempt to prevent pollution by the shipping industry of waters within the territorial jurisdiction of the State of Florida. The Act imposes unlimited liability without fault upon virtually any vessel which discharges oil or any other pollutant while destined for or leaving any Florida port.² Onshore and offshore terminal facilities are subject to the same liability.³ The Act requires every owner or operator of a vessel using a Florida port or a terminal facility to pay

whatever clean up costs or damages may result from the discharge of pollutants⁴ and to maintain satisfactory evidence of financial responsibility to satisfy such liability.⁵ The Department of Natural Resources is empowered to require any vessel transporting a pollutant in state waters to be equipped with specified containment gear and a crew trained in its use.⁶ Prior to entering a Florida port, every vessel is subject to inspection by the port manager to determine the presence of the required containment gear and the seaworthiness of the ship.⁷ He is required to notify all other ports in the state of any vessel refused entry to his port.⁸

Plaintiffs and intervenors include merchant shippers whose vessels use Florida ports in the course of transporting goods in foreign and interstate commerce; world shipping associations who insure three-fourths of the ocean-going tonnage against, among other things, liability for oil spillage; a substantial portion of the barge and towing industry operating along the Florida coast; and owners of oil terminal facilities located in Florida ports. They have challenged the validity of the Florida Act on several federal constitutional grounds. Plaintiffs' initial contention is that Florida has sought to legislate substantive maritime law which, under the United States Constitution, is exclusively within the federal domain. Secondly, they contend that the Act violates the Commerce Clause, since it seeks to regulate foreign and interstate commerce. Certain provisions of the Act are under piecemeal attack on Fourteenth Amendment due process and equal protection grounds. The resolution of the first of these contentions dictates the decision in this case, and the others will not be discussed.

The maritime law of the United States has evolved under Article 3, and Section 2, of the Constitution which extends the judicial power of the United States "to all Cases of admiralty and maritime jurisdiction." In a territorial sense that jurisdiction covers all waters navigable in interstate or foreign commerce, including state waters.⁹ Maritime law governs virtually every facet of the shipping industry from the design and construction of vessels to the regulation of their day to day operations and the transactions in which they

engage. It comprises traditional admiralty rules and concepts found initially in the European authorities. These rules and concepts have been augmented from time to time by the federal judiciary to accommodate needs distinctive to this nation. Further changes in the corpus of maritime law have been effected by a variety of congressional enactments and administrative regulations.¹⁰ One of these congressional enactments is the Water Quality Improvement Act of 1970¹¹ (hereinafter called "W.Q.I.A.") which became law a few months prior to the effective date of the Florida Act. W.Q.I.A. provides plaintiffs with tangible evidence that the Florida Act is an unconstitutional intrusion into the federal maritime domain.

The W.Q.I.A. reinforces the national anti-water pollution policy. In this act Congress declared that there should be no discharge of oil into or upon the navigable waters and shorelines of the United States.¹² The owner or operator of a vessel or an onshore or offshore facility is subject to limited liability without fault for the costs expended by the government in cleaning up an oil spill.¹³ Where the spillage results from willful negligence or misconduct, however, liability for such costs can be unlimited.¹⁴ Evidence of financial responsibility sufficient to cover its potential liability must be given by any vessel of 300 gross tons or more that uses the navigable waters of the United States.¹⁵ Additionally, the President is authorized to issue regulations requiring, among other things, that vessels maintain oil spill prevention equipment and be subject to boarding for inspection purposes at any time.¹⁶

In adopting W.Q.I.A. Congress anticipated that all hazardous substances, in addition to oil, capable of polluting navigable waters would be subject to similar legislative treatment.¹⁷ W.Q.I.A. required the President to promulgate regulations defining such hazardous substances and establishing methods and means for their removal.¹⁸ He was also required to report to Congress, by November 1, 1970, on the desirability of enacting legislation to establish liability for the cost of removing hazardous substances discharged from vessels and onshore and offshore facilities.¹⁹

That the Florida Act constituted unlawful intrusion into the exclusive federal admiralty domain is apparent when one observes the extent to which that act would change substantive maritime law. The most obvious changes would be in the liability now imposed by W.Q.I.A. and maritime rules on shippers and the operators of onshore and offshore facilities.

While both W.Q.I.A. and the Florida Act subject vessels and onshore and offshore facilities to strict liability for cleanup costs, the latter imposes a far greater measure of responsibility. For example, W.Q.I.A. would excuse a shipper who demonstrates that the oil spill was caused by act of God, an act of war, or the act or omission of a third party.²⁰ The Florida Act recognizes none of these defenses to a claim by the state for cleanup costs. The state is entitled to judgment simply by pleading and proving "the fact of the prohibited discharge."²¹ Moreover, the amount of the recovery would be unlimited; whereas W.Q.I.A. would place a limit on exposure, as we have previously noted.²²

There is perhaps an even greater contrast between maritime law and the Florida Act in compensating state or private interests for property damage, as distinguished from cleanup costs. W.Q.I.A. creates responsibility for cleanup costs only and leaves undisturbed the remedies available under maritime law for private injury caused by oil spillage or other pollution. The federal courts have long considered oil pollution as a maritime tort for which damages may be awarded.²³ Compensation is recoverable for injury to property and allowances have even been made for consequential damages. In *In re New Jersey Barging Corp.*,²⁴ an oil spill case, the court approved the following language from the Commissioner's report:

In the light of the . . . authorities, it would seem to the Commissioner that he is authorized, and in fact required, to make award of compensation for such annoyance, inconvenience and discomfort suffered by particular claimants to the extent of and in an amount commensurate with the annoyance and discomfort proven.

The recovery of damages in such cases is predicated on proof of negligence or unseaworthiness. The owner of a

seaworthy vessel would not be liable, for example, if he encountered an extraordinary peril which resulted in a non-deliberate and non-negligent pollution of the shoreline. Even if fault was established, the vessel owner's financial responsibility for property damage would be limited to the value of the vessel at the end of the voyage, plus the "freight then pending," unless the damage was caused with the owner's privity or knowledge."²⁵

Under the Florida Act, however, liability without fault is the foundation for "damage incurred by the state and for damage resulting from injury to others," just as it is in the case of cleanup costs. By substituting absolute liability for proof of negligence or unseaworthiness as a condition to unlimited recovery, the Florida Act, if valid, would materially change the substantive maritime law governing the disposition of claims arising from the pollution of coastal waters.

It is well settled that state legislation is invalid where it is in contravention with general admiralty rules or congressional enactments in the maritime field. In the landmark *Jensen* case,²⁶ the Supreme Court, in holding that the New York State Workmen's Compensation Statute could not constitutionally be applied where an accidental death occurred on a vessel afloat in navigable waters within New York's boundaries, said:

And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself.²⁷

* * *

If New York can subject foreign ships coming into her ports to such obligations as those imposed by her

Compensation Statute, other States may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded.... The legislature exceeded its authority in attempting to extend the statute under consideration to conditions like those here disclosed. So applied, it conflicts with the Constitution and to that extent is invalid.²⁸

The Florida Act here constitutes a far greater intrusion into the federal maritime domain than the New York statute in the *Jensen* case. If applied to the plaintiffs and intervenors in this case, the Florida Act would effect— in the words of *Jensen*— the “destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded.”

This is not a situation in which a state legislature has sought to act in an area of purely local concern and its enactment is no real encroachment on federal interests. Rather, this is a case where the State purports to impose upon shipping and related industries duties which under the federal law they do not bear. It can hardly be said that Florida is not seeking to regulate conduct in the federal maritime jurisdiction. We need not belabor the point that to permit the states severally to regulate these industries as Florida seeks to do would sound the death knell to the principle of uniformity.

Defendants argue that, to the extent the Florida Act goes beyond W.Q.I.A., it fill (sic) a “void” in the maritime law and is justifiable under the “gap theory.”²⁹ This theory presupposes that maritime law is an incomplete system, with numerous gaps that can be filled by state statutes. This is to say, if the maritime law affords no remedy, the states may provide one. The Supreme Court’s recent decision in *Moragne v. States Marine Lines, Inc.*³⁰ clearly puts such a theory to rest.

In that case the Court had before it the question of the applicability of the Florida Wrongful Death Statute³¹ to a claim arising out of the death of a longshoreman killed while working aboard a vessel in navigable waters within the State of Florida. Neither the general maritime law nor Congressional enactment provided a remedy in the situation. The District Court and the Court of Appeals, citing *The Tungus v. Skovgaard*,³² held that the state statute should be invoked to provide the remedy as well as the basis for recovery, that is, negligence.

Under maritime law, however, States Marine Lines owed plaintiff's decedent the duty to provide a seaworthy vessel in addition to the duty to exercise due care. Plaintiff therefore argued that an action was maintainable for a breach of either duty.

The Supreme Court rejected the notion that the absence of a federal statute or a maritime rule on the subject compelled the conclusion that state law must govern. It held that admiralty was fully capable of fashioning a remedy for the breach of substantive duties imposed by general maritime law and thus directed the district court to shape the remedy on remand. At the same time the Court observed that the Florida law of negligence has no place in the maritime field. The decision clearly reinforced the policy of uniformity and is an indication that admiralty cannot tolerate the inconsistency inherent in accommodating state remedial statutes to exclusively maritime substantive concepts.

Another argument advanced by defendants is that the Florida Act is valid under the following provision of W.Q.I.A:

Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement of liability with respect to the discharge of oil into any waters within such State. 33 U.S.C. § 1161(o) (2).

It has long been recognized that Congress is powerless to confer on the states authority to legislate within the admiralty jurisdiction [*Knickerbocker Ice Company v. Stewart*, 253 U.S. 149 (1920);³³ *The Lottawanna*, 21 Wall. 558 (1875); *The Steamer St. Lawrence*, 1 Bl. 522 (1862)] and we cannot

presume that W.Q.I.A. was an attempt to do so. There is nothing in the language of the act which purports to grant any such legislative authority to the states. The statement that Congress did not intend to preclude state imposed liability for oil pollution simply means that the states are free to enforce pollution control measures that are within their constitutional prerogative.

For the foregoing reasons we conclude that the Florida Act in question cannot constitutionally be applied to the plaintiffs and intervenors and to the activities in which they engage. The question thus arises as to whether the Act is severable. Although it contains a severability clause,³⁴ such a provision is by no means binding on a court empowered to determine the constitutionality of a statute. The rule was explained by the Supreme Court in *Carter v. Carter Coal Co.*:

Whether the provisions of a statute are so interwoven that one being held invalid the others must fall, presents a question of a statutory construction and of legislative intent, to the determination of which the statutory provision becomes an aid. "But it is a aid merely; not an inexorable command." *Dorchy v. Kansas*, 264 U.S. 286, 290. The presumption in favor [of] separability does not authorize the Court to give the statute "an effect altogether different from that sought by the measure viewed as a whole." *Railroad Retirement Bd. v. Alton R. Co.*, 295 U.S. 330, 362.

The statutory aid to construction in no way alters the rule that in order to hold one part of a statute unconstitutional and uphold another part as separable, they must not be mutually dependent upon one another.

When a federal court is called upon to rule on the constitutionality of a state statute containing a severability clause, the court will look to the decisions of the state court on the effect of such a clause.³⁶ In *Cramp v. Board of Public Instruction*³⁷ the Supreme Court of Florida made the following pronouncement on the question of severability:

The rule is well established that the unconstitutionality of a portion of a statute will not necessarily condemn

the entire act. When a part of a statute is declared unconstitutional the remainder of the act will be permitted to stand provided: (1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other and, (4) an act complete in itself remains after the invalid provisions are stricken.³⁸

In the Florida Act there are no provisions which, though standing by themselves might be considered unobjectionable, are not so interwoven in purpose and scheme with the invalid provisions of the Act as to permit the operation of the severability clause. The announced intent of the Florida Legislature was to "deal with the hazards and threats of danger and damage posed by . . . transfer of pollutants between vessels, between onshore facilities and vessels, and between offshore facilities and vessels within the jurisdiction of the state and state waters . . ." ³⁹ Each provision of this statute was enacted to realize this intent and each would affect the industries in which plaintiffs and intervenors engage. The provisions that do not directly frustrate the federal maritime law are so few that, considered together, they would not comprise a coherent legislative scheme. Accordingly, the Act in its entirety must fall.

In consideration of the foregoing, it is

ORDERED:

1. Chapter 70-244, Laws of Florida, as amended in Chapter 376, Florida Statutes Annotated, is hereby declared to be in violation of Article III, Section 2, Clause 3 of the Constitution of the United States and is therefore null and void and without effect.

2. The temporary restraining order entered by Judge Charles R. Scott on March 19, 1971, enjoining the enforcement of said chapter and any regulations promulgated thereunder is hereby made permanent; provided that nothing in this final judgment shall be construed to prohibit the

defendants from continuing to pay salaries of current employees out of the Coastal Protection Trust Fund.

3. This memorandum opinion and final judgment shall constitute the final judgment of this Court as to all issues presented in this action.

DONE AND ORDERED at Jacksonville, Florida, this 10th day of December, 1971.

/s/ Gerald Bard Tjoflat
UNITED STATES DISTRICT JUDGE

FOR THE COURT

FOOTNOTES

1. Chapter 376, Florida Statutes Annotated; Chapter 70-244, Laws of Florida (all further citations to the act will be to Florida Statutes Annotated).

2. Sections 376.12, Florida Statutes Annotated, provides in part:

Liabilities of licensees.—Because it is the intent of this chapter to provide the means for rapid and effective cleanup and to minimize damages, any licensee and its agents or servants, including vessels destined for or leaving a licensee's terminal facility, who permits or suffers a prohibited discharge or other polluting condition to take place within state boundaries shall be liable to the state for all costs of cleanup or other damage incurred by the state and for damages resulting from injury to others. In any suit to enforce claims of the state under this chapter, it shall not be necessary for the state to plead or prove negligence in any form or manner on the part of the licensee or any vessel. If the state is damaged by a discharge prohibited by this chapter it need only plead and prove the fact of the prohibited discharge or other polluting condition and that it occurred.

"Pollutants" shall include, but not be limited to, oil of any kind and in any form, gasoline, pesticides, ammonia, chlorine, and other hazardous materials." Fla. Stat. Ann. §376.031(7).

3. Terminal facilities and vessels are defined as:

"Terminal facility" means any water front facility of any kind, other than vessels not owned or operated by such facility, and related appurtenances located on land, including submerged lands, or on or under the surface of any kind of water, which facility and related appurtenances are used or capable of being used for the purpose of drilling for, pumping, storing, handling, transferring, processing, or refining oil or other pollutants, including, but not limited to, any such facility and related appurtenances owned or operated by a public utility or a governmental or quasi-governmental body. A vessel shall be considered a terminal facility only in the event of a ship-to-ship transfer of oil, petroleum products or their by-products, and other pollutants, and only that vessel going to or coming from the place of transfer and the terminal facility. With respect solely to application fees for licenses and annual license fees as required in this act, the words "terminal facility" shall not be construed to include the fuel storage tanks or other facilities of any marine service station having no more than twelve hundred (1200) gallons of pollutants in storage on the premises. Fla. Stat. Ann. §376.031(9) as amended, Laws of Florida, 71-243.

"Vessel" includes every description of watercraft or other contrivance used, or capable of being used, as a means of transportation on water, whether self-propelled or otherwise, and includes barges and tugs. Fla. Stat. Ann. §376.031(12).

4. See note 2, *supra*.

5. Section 376.14, Florida Statutes Annotated, provides, in part:

(1) Each owner or operator of a terminal facility or vessel, including any barge, using any port in Florida shall establish and maintain under rules and regulations prescribed by the department of natural resources, evidence of financial responsibility based on the capacity of the terminal facility or tonnage of the ship, the cargo carried, and other similar factors to which the vessel could be subjected under this chapter. Financial responsibility may be established and maintained by any one (1), or a combination, of the following methods acceptable to the department:

- (a) Evidence of insurance;
 - (b) Surety bonds payable to the governor of the state, conditioned to pay all costs and expenses of the cleanup of any discharge as well as damages caused to the state and any person;
 - (c) Qualification as a selfinsurer; or
 - (d) Other evidence of financial responsibility satisfactory to the department.
- (2) A bond filed with the department shall be issued by a bonding company authorized to do business in the state.
- (3) Any claim for costs incurred by a terminal facility or vessel may be brought directly against the insurer or any other person providing evidence of financial responsibility. Any claim for costs of cleanup, civil penalties, or damages by the state, and any claim for damages by any injured person, may be brought directly against the bond, the insurer, or any other person providing evidence of financial responsibility.

6. Section 376.07, Florida Statutes Annotated, provides in part:

Regulatory powers of department.—The department shall from time to time adopt, amend, repeal, and enforce reasonable regulations insofar as they relate to oil spills or discharges or the spills or discharges of other pollutants into the waters of this state or onto the coasts of this state.

(1) The regulations shall be adopted in accordance with the administrative procedure act, chapter 120.

(2) The department shall adopt regulations including, but not limited to, the following matters:

(a) Operation and inspection requirements for facilities, vessels, personnel, and other matters relating to licensee operations under

this chapter, and specifically requiring that vessels transporting pollutants within state waters shall maintain on board such containment gear as may be required by the department with a crew trained in the use of the gear.

(b) Procedures and methods of reporting discharges and other occurrences prohibited by this chapter.

(c) Procedures, methods, means, and equipment to be used by persons subject to regulation by this chapter in the removal of pollutants.

* * *

(f) Requirements for minimum weather and sea conditions for permitting a vessel to enter port and for the safety and operation of vessels, barges, tugs, motor vehicles, motorized equipment, and other equipment relating to the use and operation of terminals, facilities, and refineries, the approach and departure from terminals, facilities, and refineries and requirements that containment gear approved by the department be on hand and maintained by terminal facilities and refineries with adequate personnel trained in its use.

(g) Requirements that, prior to being granted entry into any port in this state, the master of a vessel shall report:

(1) Any discharges of oil or other pollutants the vessel has had since leaving the last port;

(2) Any mechanical problem on the vessel which creates the possibility of a spill; and

(3) Any denial of entry into any port during the current cruise of the vessel.

7. Section 376.08(2), Florida Statutes Annotated, provides:

The port manager shall have the authority to board any vessel prior to its entry into port in order to ascertain the seaworthiness of the vessel and the presence of required containment gear. Upon being notified of a discharge the port manager shall have authority to direct the vessel to anchor immediately or move to a specific dock and deploy containment gear or to move to the open seas and to take such other measures as he deems necessary. The port manager shall have the additional duty to inspect any terminal facility in his port to determine that adequate containment gear is on hand at the terminal facility.

8. Section 376.08(3), Florida Statutes Annotated, provides:

A port manager who refuses entry of any vessel into the port under his charge shall be required to notify all other ports in the state of his refusal of entry of that vessel.

9. "[T]he admiralty jurisdiction of the United States extends to all

waters, salt or fresh, with or without tides, natural or artificial, which are in fact navigable in interstate or foreign water commerce, whether or not the particular body of water is wholly within a state, and whether or not the occurrence or transaction that is the subject matter of the suit is confined to one state." *Gilmore and Black, The Law of Admiralty*, §1-11, at 28-29 (1957) and cases cited therein.

Arguably, this would include land-locked lakes which are "navigable-in-fact" in interstate commerce.

10. The "Necessary and Proper Clause" of the United States Constitution (Article I, Section 8, Clause 18), read in context with the "Admiralty Clause" (Article III, Section 2, Clause 3) confers upon Congress the power to enact legislation in the maritime field. *Knickerbocker Ice Company v. Stewart*, 253 U.S. 149 (1920); *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917).

11. 33 U.S.C. §1161 *et seq.*

12. 33 U.S.C. §1161(b)(1).

13. The amount of liability of a vessel is limited to \$100 per gross ton or \$14,000,000 whichever is less. The liability of an onshore or offshore facility is limited to \$8,000,000. 33 U.S.C. § 1161(f) (1), (2) and (3).

14. 33 U.S.C. §1161(f)(1), (2) and (3).

15. 33 U.S.C. §1161(p).

16. 33 U.S.C. §1161(j).

17. 33 U.S.C. § 1162.

18. *Id.*

19. *Id.*

20. 33 U.S.C. §1161(f).

21. See note 2, *supra*. Section 376.11 establishes the Florida Coastal Protection Fund. One of the purposes of the fund is to provide moneys to be used by the Department of Natural Resources in cleaning up oil spills. The state's recovery of cleanup costs—by simply pleading and providing the fact of a discharge under Section 376.12—provides revenue for the fund. If the party causing the oil spill wants to contend that the discharge was caused by an act of God, for example, he must petition

the department *after* he has been held liable for the cleanup costs. If the Department, in the exercise of its discretion, concludes that the contention is well made, it may waive the State's right to reimbursement of the cleanup cost. Whether the petition is granted or not is a matter solely for the Department to decide, for its decision on the merits is not subject to judicial review, as Section 376.11(6)(b) provides:

"The findings of the department shall be conclusive as it is the legislative intent that the waiver provided in this paragraph is a privilege conferred, not a right granted."

22. See notes 2 & 13 *supra* and accompanying text. The potential for conflict is equally present between the regulatory scheme envisioned by the Florida Act and present regulation under federal acts. Pursuant to the W.Q.I.A. the President was required to publish a National Contingency Plan to remove oil spills and to minimize damage and to promulgate regulations "consistent with maritime safety and with marine and navigation laws." 33 U.S.C. §1161(c), (j). These regulations are to cover, for example, the establishment of

"procedures, methods, and requirements for equipment to prevent discharges of oil from vessels and from onshore facilities and offshore facilities and . . . governing the inspection of vessels carrying cargoes in order to reduce the likelihood of discharges of oil from such vessels . . ." 33 U.S.C. §1161(j).

The Florida Act obligates the Department of Natural Resources to act in the same areas. See note 6 *supra*. The potential for conflict in these two regulatory schemes is obvious.

It is likely that regulations promulgated under the Florida Act would further be discordant with the Steamboat Inspection Act, Title 46, U.S.C. §361 *et seq.*, and regulations promulgated thereunder. Section 376.08(2), Florida Statutes Annotated, provides that

"[t]he port manager shall have authority to board any vessel prior to its entry into port in order to ascertain the seaworthiness of the vessel and the presence of the required containment gear."

At the same time the Steamboat Inspection Act, together with the regulations issued pursuant thereto, sets up a detailed and comprehensive scheme, administered by the United States Coast Guard, for maintenance, inspection, and regulation of all vessels (except motor boats, which are otherwise provided for) propelled in whole or in part by mechanical or electrical power in the navigable waters of the United States. 46 U.S.C. §§361-62. The Federal scheme is in consonance with the International Convention for the Safety of Life at Sea, 1960, T.I.A.S., 16 U.S.T. 185, 536 U.N.T. S.2 27, which has been ratified or adhered to by all maritime nations, including the United States. Here again, conflict between the regulations under the Florida Act and the federal law appears unavoidable.

23. See, e.g., *Fireman's Fund Ins. Co. v. Standard Oil Co.*, 339 F.2d 148 (9th Cir. 1964); *Salaky v. Atlas Barge No. 3*, 208 F.2d 174 (2nd Cir. 1953); *California v. The Bournemouth*, 307 F.Supp. 922 (C.D.Cal. 1969); *Petition of New Jersey Barging Corp.*, 168 F.Supp. 925 (S.D.N.Y. 1958). Since the Congressional enactment of the Admiralty Extension Act in 1948 (46 U.S.C. § 740) "all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land" (emphasis added) are considered maritime torts and thus within the admiralty jurisdiction. *Petition of New Jersey Barging Corp.*, *supra*.

24. 168 F.Supp. 925, 937 (S.D.N.Y. 1958).

25. United States Limited Liability Act, 46 U.S.C. § 183 *et seq.* No state statute can override this "Limitation Statute" within the territorial jurisdiction of the federal maritime law. In *Butler v. Boston & Savannah Steamship Co.*, 130 U.S. 527, 555 (1889), the Supreme Court observed:

"The law of limited liability, as we have frequently had occasion to assert, was enacted by Congress as a part of the maritime law of this country, and therefore it is co-extensive, in its operation, with the whole territorial domain of that law."

In holding that a Massachusetts wrongful death action, arising from a death occurring in the admiralty jurisdiction, was subject to the "Limitation Statute", the Court went on to say:

"It is unnecessary to consider the force and effect of the statute of Massachusetts over the place in question. Whatever force it may have in creating liabilities for acts done there, it cannot neutralize or affect the admiralty or maritime jurisdiction or the operation of the maritime law in maritime cases. Those are matters of national interest. If the territory of the state technically extends a marine league beyond the seashore, that circumstance cannot circumscribe or abridge the law of the sea." 130 U.S. at 557-58.

26. *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917).

27. *Id.* at 216.

28. *Id.* at 217-18.

29. See, Currie, "Federalism and the Admiralty," *The Supreme Court Review* 1960, 158 at 166-73.

30. 398 U.S. 375 (1970).

31. Fla. Stat. Ann. § 768.01.

32. 358 U.S. 588 (1959).

33. In the *Knickerbocker* case the Court, speaking to the question of state legislative authority in the maritime field, said:

"The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the States all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations." 253 U.S. at 160-61. (Emphasis added).

34. Laws of Florida, 70-244 §23.

35. 298 U.S. 238, 313 (1936).

36. *Watson v. Buck*, 313 U.S. 387 (1941).

37. 137 So.2d 828 (Fla. 1962).

38. *Id.* at 830.

39. Fla. Stat. Ann. §376.021(3)(a), (4)(a).

Ch. 70-244

SECOND REGULAR SESSION

AIR AND WATER POLLUTION CONTROL
CHAPTER 70-244

COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 450

An Act relating to pollutants; providing definitions; prohibiting such pollution; providing for authority in the department of natural resources to act in preventing and controlling oil spills and other pollution; authorizing the department to provide employees and equipment in ports and other places; providing for recovery of cost in controlling and cleaning pollution; providing for licenses for terminal facilities, and for fees and exceptions; creating Florida coastal protection fund; providing for strict liability; providing for criminal and civil penalties; providing for the removal of derelict vessels by the state; providing for cooperation and coordination of all state agencies; authorizing the department of natural resources to require by rules and regulations that terminal facilities and vessels establish and maintain evidence of financial responsibility to reimburse the state and private citizens for damages caused by discharges of pollutants; providing an appropriation; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Short title

This act shall be known as "the oil spill prevention and pollution control act."

Section 2. Legislative intent

(1) The legislature finds and declares that the highest and best use of the seacoast of the state is as a source of public and private recreation.

(2) The legislature further finds and declares that the preservation of this use is a matter of the highest urgency and priority and that such use can only be served effectively by

maintaining the coastal waters, estuaries, tidal flats, beaches and public lands adjoining the seacoast in as close to a pristine condition as possible, taking into account multiple use accommodations necessary to provide the broadest possible promotion of public and private interests.

(3) The legislature further finds and declares that the transfer of pollutants between vessels, between onshore facilities and vessels and between offshore facilities and vessels within the jurisdiction of the state and state waters is a hazardous undertaking; that spills, discharges and escape of pollutants occurring as a result of procedures involved in the transfer, storage, and transportation of such products pose threats of great danger and damage to the environment of the state; to owners and users of shorefront property; to public and private recreation; to citizens of the state and other interests deriving livelihood from marine related activities; and to the beauty of the Florida coast; that such hazards have frequently occurred in the past, are occurring now and present future threats of potentially catastrophic proportions, all of which are expressly declared to be inimical to the paramount interests of the state as herein set forth and that such state interests outweigh any economic burdens imposed by the legislature upon those engaged in transferring pollutants and related activities.

(4) The legislature intends by the enactment of this legislation to exercise the police power of the state through the department of natural resources by conferring upon said department power to deal with the hazards and threats of danger and damage posed by such transfers and related activities; to require the prompt containment and removal of pollution occasioned thereby; and to establish a fund to provide for the inspection and supervision of such activities and guarantee the prompt payment of reasonable damage claims resulting therefrom.

(5) The legislature further finds and declares that the preservation of the public uses referred to herein is of grave public interest and concern to the state in promoting its general welfare, preventing diseases, promoting health and providing for the public safety, and that the state's interest in

such preservation outweighs any burdens of absolute liability imposed by the legislature upon those engaged in transferring pollutants and related activities.

(6) The legislature further declares that it is the intent of this act to support and complement applicable provisions of the federal water quality improvement act of 1970,¹ specifically those provisions relating to the national contingency plan for removal of oil and other pollutants.

¹ 33 U.S.C.A. §1151 et seq.

Section 3. Definitions

When used in this act, unless the context clearly requires otherwise:

(1) "Department" means the department of natural resources.

(2) "Director" means the executive director of the department of natural resources.

(3) "Barrel" means forty-two (42) U.S. gallons at sixty degrees (60°) Fahrenheit.

(4) "Other measurements" means measurements set by the department for products transferred at terminals which are other than fluid or which are not commonly measured by the barrel.

(5) "Discharge" means any spilling, leaking, seeping, pouring, emitting, emptying, or dumping.

(6) "Fund" means the Florida coastal protection fund.

(7) "Pollutants" shall include but not be limited to oil of any kind and in any form, gasoline, pesticides, ammonia, chlorine, and other hazardous materials.

(8) "Pollution" means the presence in the outdoor atmosphere or waters of the state of any one (1) or more substances or pollutants in quantities which are or may be potentially harmful or injurious to human health or welfare, animal or plant life, or property, or which may unreasonably interfere with the enjoyment of life or property, including outdoor recreation.

(9) "Terminal facility" means any waterfront facility of any kind, other than vessels not owned or operated by such facility, and related appurtenances located on land, including

submerged lands, or on or under the surface of any kind of water, which facility and related appurtenances are used or capable of being used for the purpose of drilling for, pumping, storing, handling, transferring, processing, or refining oil or other pollutants, including, but not limited to, any such facility and related appurtenances owned or operated by a public utility, or a governmental or quasi-governmental body.

A vessel shall be considered a terminal facility only in the event of a ship to ship transfer of oil, petroleum products, their by-products, and other pollutants, and only that vessel going to or coming from the place of transfer and the terminal facility.

(10) "Owner or operator" means any person owning or operating a terminal facility whether by lease, contract, or any other form of agreement.

(11) "Transferred" includes both onloading and offloading between terminal and vessel and vessel to vessel.

(12) "Vessel" includes every description of watercraft or other contrivance used, or capable of being used, as a means of transportation on water, whether self-propelled or otherwise, and includes barges and tugs.

(13) "Port manager" means the manager or director of the port or his designee, to be approved by the department, to carry out the requirements of this act.

(14) "Person in charge" means the person on the scene who is in direct, responsible charge of a terminal facility or vessel from which oil or other pollutants are discharged when the discharge occurs.

(15) "Discharge cleanup organization" means any group, incorporated or unincorporated, of owners or operators of waterfront terminal facilities in any port or harbor of the state, and any other person who may elect to join, organized for the purpose of containing and cleaning up discharges of oil and other pollutants through cooperative efforts and shared equipment and facilities.

Section 4. Pollution and corruption of waters and lands of the state prohibited

The discharge of oil, petroleum products, their by-products, and other pollutants into or upon any coastal waters,

estuaries, tidal flats, beaches, and lands adjoining the seacoast of the state is prohibited.

Section 5. Powers and duties of the department

(1) The powers and duties conferred by this act shall be exercised by the department of natural resources and shall be deemed to be an essential governmental function in the exercise of the police power of the state. The department of air and water pollution control is directed to cooperate with the department of natural resources and to offer consultative services, enforcement, prosecution, and technical advice to the department. The department may call upon any other state agency for consultative services and technical advice and the said agencies are directed to cooperate in said request.

(2) The powers and duties of the department under this act shall extend to the boundaries of the state described in article II, section 1 of the constitution of Florida.

(3) Licenses required under this act shall be issued from the department subject to such terms and conditions as are set forth in this act and as set forth in rules and regulations promulgated by the department as authorized herein.

(4) Whenever it becomes necessary for the state to protect the public interest under this act, it shall be the duty of the department of natural resources to keep an accurate record of costs and expenses incurred and thereafter diligently to pursue the recovery of any sums so incurred from the government of the United States under any applicable federal act.

Section 6. Operation without license prohibited

(1) No person shall operate or cause to be operated a terminal facility as defined in this act without a license.

(2) Licenses shall be issued on an annual basis and shall expire on December 31 annually, subject to such terms and conditions as the department may determine are necessary to carry out the purposes of this act.

(3) As a condition precedent to the issuance or renewal of a license the department shall require satisfactory evidence that the applicant has implemented or is in the process of implementing state and federal plans and regulations for

control of pollution related to oil, petroleum products, their byproducts and other pollutants and the abatement thereof when a discharge occurs.

(4) Licenses issued to any terminal facility shall include vessels used to transport oil, petroleum products, their by-products, and other pollutants between the facility and vessels within state waters.

(5) The director may require, in connection with the issuance of a terminal facility license, the payment of a reasonable fee for processing applications for registration certificates. Such fee shall be reasonably related to the administrative costs of verifying data submitted pursuant to obtaining such certificates and reasonable inspections; provided, however, such fee shall not exceed \$250.00 per terminal facility per year.

(6) Within three (3) months of the effective date of this act every owner or operator of a terminal facility shall obtain a license. The department shall issue a license upon the showing that the said registrant can provide all necessary equipment to prevent, contain and remove discharges of oil and other pollutants.

(7) On or after a date to be determined by the director, but in no case later than ninety (90) days after the effective date of this act, no person shall operate or cause to be operated any terminal facility without a terminal facility registration certificate issued by the director. No registration certificate shall be valid for more than one (1) year unless revalidated by the director. Each applicant for a terminal facility registration certificate shall pay the annual license fee and shall submit information, in a form satisfactory to the director, describing the following:

(a) The barrel or other measurement capacity of such terminal facility.

(b) All containment and removal equipment, including, but not limited to, vehicles, vessels, pumps, skimmers, booms, chemicals, and communication devices, to which such facility has access, whether through direct ownership, by contract, or by membership in an approved discharged cleanup organization.

(c) The terms of agreement and operation plan of any such discharge cleanup organization to which the owner or operator of such terminal facility belongs.

(8) Upon showing of satisfactory containment and cleanup capability under this section, and upon payment of any registration fee required by the director under this act and the license fee the applicant shall be issued a registration certificate covering such terminal facility and related appurtenances, including vessels as defined in this act.

Section 7. Regulatory powers of department

The department shall from time to time adopt, amend, repeal, and enforce reasonable regulations insofar as they relate to oil spills or discharges or the spills or discharges of other pollutants into the waters of this state, or onto the coasts of this state.

(1) Such regulations shall be adopted in accordance with the administrative procedure act, chapter 120, Florida Statutes.

(2) The department shall adopt regulations including but not limited to the following matters:

(a) Operating and inspection requirement for facilities, vessels, personnel and other matters relating to licensee operations under this act and specifically requiring that vessels transporting pollutants within state waters shall maintain on board such containment gear as may be required by the department with a crew trained in the use of such gear.

(b) Procedures and methods of reporting discharges and other occurrences prohibited by this act. Specifically, the pilot and the master of a vessel causing a discharge shall be required to immediately report the discharge to the port manager and to the nearest coast guard station. The port manager, on being notified of a discharge, shall immediately notify the response team of the department and the coast guard and shall keep them fully informed of the need for containment equipment and emergency action.

(c) The port manager shall have the authority to board any vessel prior to its entry into port in order to ascertain the seaworthiness of the vessel and the presence of required

containment gear. Upon being notified of a discharge the port manager shall have authority to direct the vessel to immediately anchor or move to a specific dock and deploy containment gear or to move to the open seas and to take such other measures as he deems necessary. The port manager shall have the additional duty to inspect any terminal facility in his port to determine that adequate containment gear is on hand at the terminal facility.

(d) Procedures, methods, means, and equipment to be used by persons subject to regulation by this act and to be used in the removal of pollutants.

(e) Development and implementation of criteria and plans to meet oil petroleum, and other pollution occurrences of various degrees and kinds.

(f) The establishment of eleven (11) regional control districts, one for each of the eleven (11) deep water ports of the state, with a response team in each district and the establishment of rules and regulations to meet the particular requirements of each such district. The department shall create a state response team which shall be responsible for creating and maintaining a contingency plan of response, organization, and equipment for handling emergency cleanup operations. The state plans shall include detailed emergency operating procedures for the state as a whole and for the eleven (11) regional control districts, and the team shall from time to time conduct practice alerts. These plans shall be filed with the governor, all coast guard stations in the state and with the head of each regional team. The contingency plan shall include all necessary information for the total containment and cleanup of pollution, including but not limited to an inventory of equipment and its location, a table of organization with the names, addresses, and telephone numbers of all persons responsible for implementing every phase of the plan, a list of available sources of supplies necessary for cleanup and a designation of priority zones within each region to determine the sequence and methods of cleanup. The state response team shall act independently of agencies of the federal government but is directed to cooperate with any federal cleanup operation.

(g) Requirements for minimum weather and sea conditions for permitting a vessel to enter port and for the safety and operation of vessels, barges, tugs, motor vehicles, motorized equipment, and other equipment relating to the use and operation of terminals, facilities, and refineries, the approach and departure from terminals, facilities, and refineries, and shall require that containment gear approved by the department be on hand and maintained by terminal facilities, and refineries with adequate personnel trained in its use.

(h) Requirements that, prior to being granted entry into any port in this state, the master of a vessel shall report:

1. Any discharges of oil or other pollutants the vessel has had since leaving the last port.
2. Any mechanical problem on the vessel which creates the possibility of a spill.
3. Any denial of entry into any port during the current cruise of the vessel.

(i) A port manager who refuses entry of any vessel into the port under his charge shall be required to notify all other ports in the state of his refusal of entry of that vessel.

(j) Such other rules and regulations as the exigencies of any condition may require or such as may reasonably be necessary to carry out the intent of this action.

Section 8. Removal of prohibited discharges

(1) Any person discharging pollutants as prohibited by section 4 shall immediately undertake to remove such discharge to the department's satisfaction. Notwithstanding the above requirement the department may undertake the removal of such discharge and may contract and retain agents who shall operate under the direction of the department.

(2) Whenever oil or any other pollutant is discharged from any terminal facility or vessel in violation of section 4 of this act, the person in charge of such terminal facility or vessel shall promptly remove, or arrange for the removal of, such oil or other pollutant. If the person in charge fails so to act, the director may arrange for the removal of such pollutant; provided that, if such oil or other pollutant was discharged

into or upon the navigable waters of the United States, the director shall act in accordance with the national contingency plan for removal of oil or other pollutant established pursuant to the federal water quality improvement act of 1970 and the costs of removal incurred by the director shall be paid in accordance with the applicable provisions of said law.

(3) In the event of discharge, the source of which is unknown, any local discharge cleanup organization shall, upon the request of the director or his designee, immediately contain and remove such discharge. No action taken by any person to contain or remove a discharge, whether such action is taken voluntarily or at the request of the director or his designee, shall be construed as an admission of liability for such discharge.

(4) No person who voluntarily, or at the request of the director or his designee, renders assistance in containing or removing oil or other pollutants shall be liable for any civil damages to third parties resulting solely from acts or omissions of such person in rendering such assistance, except for acts or omissions amounting to gross negligence or willful misconduct.

(5) Nothing in this act shall affect in any way the right of any person who renders assistance in containing or removing oil or other pollutants to reimbursement for the costs of such containment or removal under the applicable provisions of the federal water quality improvement act of 1970¹ or any rights which said person may have against any third party whose acts or omissions in any way have caused or contributed to the discharge of such oil or other pollutants.

¹ 33 U.S.C.A. § 1151 et seq.

Section 9. Personnel and equipment

The department shall establish and maintain at such ports within the state, and other places as it shall determine, such employees and equipment, other than such equipment furnished by the licensee, as in its judgment may be necessary to carry out the provisions of this act. The department may employ and prescribe the duties of such employees, subject to the rules and regulations of the division of personnel and

retirement of the department of administration. The salaries of such employees and the cost of such equipment shall be paid from the Florida coastal protection fund established by this act. The department shall periodically consult with other departments of the state and specifically with the department of air and water pollution control relative to procedures for the prevention of discharges of oil and other pollutants into the coastal waters of the state from off-shore drilling production facilities.

Section 10. Enforcement, penalties

Whoever violates any provisions of this act or any rule, regulations, or order of the department made hereunder shall be punished by a civil penalty of not more than fifty thousand dollars (\$50,000) to be assessed by the department. Each day that any violation continues constitutes a separate offense. The provisions of this section shall not apply to any discharge immediately reported and completely removed by a licensee in accordance with the regulations and orders of the department.

Section 11. Florida coastal protection fund

(1) The Florida coastal protection fund is established to be used by the department as a non-lapsing revolving fund for carrying out the purposes of this act. The fund shall be limited to the sum of five million dollars (\$5,000,000).

To this fund shall be credited all license fees, penalties, and other fees and charges related to this act, including administrative expenses, and costs of removal of discharges of pollution.

(2) Moneys in the fund not needed currently to meet the obligations of the department in the exercise of its responsibilities under this act shall be deposited with the treasurer to the credit of the fund, and may be invested in such manner as is provided for by statute. Interest received on such investment shall be credited to the Florida coastal protection fund.

(3) Each registrant shall obtain from the department a license for each of the terminal facilities of the registrant in

the state and shall pay therefor an annual license fee, the amount of which is to be determined by the department upon the basis of the total capacity of the terminal facility for oil and other pollutants, but in no event shall exceed five hundred dollars (\$500.00). License fees for a part of a year shall be prorated.

(4) Whenever the balance in the fund has reached the limit provided under this act, and as long as it remains so, license fees shall be proportionately reduced to cover only administrative expenses.

(5) Moneys in the Florida coastal protection fund shall be disbursed for the following purposes and no others:

(a) Administrative expenses, personnel expenses and equipment costs of the department related to the enforcement of this act.

(b) All costs involved in the abatement of pollution related to the discharge of oil, petroleum products, their by-products and other pollutants covered by this act and the abatement of other potential pollution hazards as authorized herein.

(c) All costs and expenses of the cleanup and rehabilitation of water fowl and other wildlife, whether performed by the department or any other state or local agency.

(6) The department shall recover to the use of the fund from the person or persons causing the discharge jointly and severally all sums expended therefrom, including overdrafts, for the following purposes; provided that recoveries resulting from damage due to an oil pollution or other similar disaster shall be apportioned between the Florida coastal protection fund and the general revenue fund so as to repay the full costs to the general revenue fund of any sums disbursed therefrom as a result of such disaster:

(a) All costs and expenses expended under paragraphs (b) and (c) of subsection (5) of this act.

(b) Requests for reimbursement to the fund for the above costs if not paid within thirty (30) days of demand shall be turned over to the department of air and water pollution control which, in cooperation with the attorney general, shall undertake the collection.

(c) Upon petition of the person determined to be liable

for reimbursement to the fund for abatement costs under subsection (6) the department may, after hearing, waive the right to reimbursement to the fund from such person if the department finds that the occurrence was the result of any of the following:

1. An act of war.
2. An act of government, either state, federal, or municipal.
3. An act of God, which means an unforeseeable act exclusively occasioned by the violence of nature without the interference of any human agency.
4. An act or omission of a third party without regard to whether any such act or omission was or was not negligent.

The findings of the department shall be conclusive as it is the legislative intent that waiver provided in this act is a privilege conferred, not a right granted.

Section 12. Liabilities of licensees

Because it is the intent of this act to provide the means for rapid and effective cleanup and to minimize damages, any licensee and its agents or servants including vessels destined for or leaving a licensee's terminal facility who permits or suffers a prohibited discharge or other polluting condition to take place within state boundaries shall be liable to the state for all costs of cleanup or other damage incurred by the state and for damages resulting from injury to others. In any suit to enforce claims of the state under this act, it shall not be necessary for the state to plead or prove negligence in any form or manner on the part of the licensee or any vessel. If the state is damaged by a discharge prohibited by this act it need only plead and prove the fact of the prohibited discharge or other polluting condition and that it occurred. In addition to the civil penalty, the pilot and the master of any vessel or person in charge of any licensee's terminal facility who fail to give immediate notification of a discharge to the port manager and the nearest coast guard station shall be guilty of a felony and shall, upon conviction, be punished by imprisonment for not more than two (2) years or by a fine of

not more than ten thousand dollars (\$10,000). The department shall, by rules and regulations, require that the licensee designate a person at the terminal facility who shall be the person in charge of that facility for the purposes specified by this section.

Section 13. Emergency proclamation; governor's powers

(1) Whenever any disaster or catastrophe exists or appears imminent arising from the discharge of oil, petroleum products or their by-products, or any other pollutants, the governor shall by proclamation declare the fact and that an emergency exists in any or all sections of the state. If the governor is unavailable, the lieutenant governor shall, by proclamation, declare the fact and that an emergency exists in any or all sections of the state. A copy of such proclamation shall be filed with the secretary of state.

(2) In performing his duties under this act, the governor is authorized and directed to cooperate with all departments and agencies of the federal government, with the offices and agencies of other states and foreign countries, and the political subdivisions thereof, and with private agencies in all matters pertaining to a disaster or catastrophe.

(3) In performing his duties under this act, the governor is further authorized and empowered:

(a) To make, amend and rescind the necessary orders, rules and regulations to carry out this act within the limits of the authority conferred upon him and not inconsistent with the rules, regulations and directives of the President of the United States or of any federal department or agency having specifically authorized emergency functions.

(b) To delegate any authority vested in him under this act, and to provide for the subdelegation of any such authority.

(4) Whenever the governor is satisfied that an emergency no longer exists, he may terminate the proclamation by another proclamation affecting the sections of the state covered by the original proclamation, or any part thereof. Said proclamation shall be published in such newspapers of the state and posted in such places as the governor, or the person acting in that capacity, deems appropriate.

Section 14. Terminal facilities and vessels required to file bond

(1) Each owner or operator of a terminal facility or vessel, including any barge, using any port in Florida shall establish and maintain, under rules and regulations prescribed by the department of natural resources, evidence of financial responsibility based on the capacity of the terminal facility or tonnage of the ship, the cargo carried, and other similar factors to which the vessel could be subjected under this act. Financial responsibility may be established and maintained by any one (1) of, or a combination of the following methods acceptable to the department:

(a) Evidence of insurance,

(b) Surety bonds payable to the governor of the state conditioned to pay all costs and expenses of the cleanup of any discharge as well as damages caused to the state and any other person,

(c) Qualification as a self-insurer, or

(d) Other evidence of financial responsibility satisfactory to the department.

(2) If a bond is filed with the department, then such bond shall be issued by a bonding company authorized to do business in the state.

(3) Any claim for costs incurred by such terminal facility or vessel may be brought directly against the insurer or any other person providing evidence of financial responsibility. Any claim for costs of cleanup, civil penalties or damages by the state and any claim for damages by any injured person may be brought directly against the bond, the insurer, or against any other person providing evidence of financial responsibility.

(4) Each owner or operator of a terminal facility or a vessel subject to the provisions of this act shall designate a person in the state as his legal agent for service of process under this act and such designation shall be filed with the secretary of state. In the absence of such designation the secretary of state shall be the designated agent for purposes of service of process under this act.

Section 15. Derelict vessels

(1) It is unlawful for any person, firm or corporation to store or leave any vessel in a wrecked, junked or substantially dismantled condition or abandoned upon any public waters or at any port in this state without the consent of the agency having jurisdiction thereof, or docked at any private property without the consent of the owner of such private property.

(2) The department is hereby designated as the agency of the state authorized and empowered to remove any derelict vessel from public waters in any instance when the same obstructs or threatens to obstruct navigation or contributes to air or water pollution or in any other way constitutes a danger or potential danger to the environment. This section shall constitute the authority of the department for such removal, but is not intended to be in contravention of any applicable federal act. The attorney general shall be the representative of the department of natural resources in such actions.

Section 16. Enforcement and penalties

It shall be unlawful for any person to violate any provision of this act or any rule, regulation or order of the department made hereunder. Violation shall be punishable by a civil penalty up to fifty thousand dollars (\$50,000) to be assessed by the department. Each day during any portion of which such violation occurs constitutes a separate offense. Penalties assessed herein for a discharge shall be the only penalties assessed by the state and the assessed person or persons shall be excused from paying any additional penalty for water pollution assessable under chapter 403, Florida Statutes, for the same occurrence. The penalty provisions of this act shall not apply to any discharge promptly reported and removed by a licensee in accordance with the rules, regulations and order of the department.

Section 17. Reports to the legislature

The department shall include in its recommendations to each legislature specific recommendations relating to the operation of this act, specifically including a license fee

formula to reflect individual licensee experience, and a fee schedule based upon volatility and toxicity of petroleum products, their by products and other pollutants.

Section 18. Budget approval

The department shall submit to each legislature its budget recommendations for disbursements from the fund. Upon approval thereof, the comptroller shall authorize expenditures therefrom as approved by the department.

Section 19. County and municipal ordinances; powers limited

Nothing in this act shall be construed to deny any county or municipality by ordinance or by law from exercising police powers under any general or special act, and laws and ordinances promulgated in furtherance of the intent of this act to promote the general welfare, public health, and public safety shall be valid unless in direct conflict with the provisions of this act or any rule, regulations, or order of the department adopted under authority of this act; provided, however, that in order to avoid unnecessary duplication, no county, municipality, or other political subdivision of the state may adopt or establish a similar program of licensing and fees for the accomplishment of the purposes of this act.

Section 20.

Nothing in this act shall be deemed to apply to the storage or transportation of liquefied petroleum gas or to industrial effluents discharged into the waters or atmosphere of the state pursuant to a permit issued by department of air and water pollution control.

Section 21. Construction

This act, being necessary for the general welfare, the public health, and the public safety of the state and its inhabitants, shall be liberally construed to effect the purposes set forth under this act and the federal water quality improvement act of 1970.¹

¹ 33U.S.C.A. § 1151 et seq.

Section 22.

There is hereby appropriated from the general revenue fund one hundred thousand dollars (\$100,000) to be transferred and deposited in the trust fund created in section 11 of this act. When the trust fund exceeds one million dollars (\$1,000,000), then the total sum transferred originally from the general revenue fund shall be returned to the general revenue fund.

Section 23.

The provisions of this act are severable, and it is the intention to confer the whole or any part of the powers provided herein, and if any of the provisions of this act shall be held unconstitutional by any court of competent jurisdiction, the decision of such court shall not affect or impair any of the remaining provisions.

Section 24. This act shall take effect July 1, 1970.

Approved by the Governor June 30, 1970.

Filed in Office Secretary of State June 30, 1970.

**STATE OF FLORIDA
DEPARTMENT OF NATURAL RESOURCES
Division of Marine Resources**

CHAPTER 16B-16.08

**Chapter 70-244 - Oil Spill Bill
Financial Responsibility - Vessels**

16B-16.08

(1) No vessel or barge, carrying oil of any kind and in any form, gasoline, pesticides, ammonia, chlorine, or other hazardous materials as cargo, shall use any port in Florida on or after March 1, 1961, for any purpose unless a certificate of financial responsibility has been issued by the Department covering such vessel or barge.

(2) Either owners or operators of vessels or barges subject

to Chapter 70-244, Laws of Florida, must establish and maintain with the Department evidence of financial responsibility in an amount not to exceed \$100 per gross ton of such vessel or \$5,000,000 whichever is lesser. Provided, however, that if an applicant is the owner of more than one vessel or barge subject to this rule, financial responsibility need only be established in an amount necessary to meet the maximum amount of financial responsibility to which the largest vessel or barge could be subjected hereunder. Nothing herein shall be construed to prohibit third parties from establishing evidence of financial responsibility for such owners or operators of vessels or barges.

(3) The financial responsibility herein required may be established and maintained by any one (1) of, or a combination of, the following methods acceptable to the Department:

(a) Evidence of insurance - conditioned to pay all costs and expenses of the cleanup of any discharge as well as damages caused to the state and any other person.

(b) Surety bonds payable to the governor of the State conditioned to pay all costs and expenses of the cleanup of any discharge as well as damages caused to the state and any other person.

(c) Qualification as self-insurer, or

(d) Other evidence of financial responsibility satisfactory to the Department.

(4) All applications, evidence, documents, and other statements required to be filed with the Department shall be in English, and any monetary terms shall be expressed in terms of United States currency. Such evidence of financial responsibility shall be on forms furnished by the Department upon request of the applicant.

(5) Where evidence of financial responsibility has been established, a separate certificate covering each vessel shall be issued evidencing the Department's finding of adequate financial responsibility to meet the minimum requirements of this rule.

General Authority

Chapter 70-244(7)

General Laws of Florida

Law Implemented

Chapter 70-244(14)

General Laws of Florida

33 U.S.C. § 1161.

§ 1161. Control of pollution by oil—Definitions

(a) For the purpose of this section, the term—

(1) "oil" means oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil;

(2) "discharge" includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying or dumping;

(3) "vessel" means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water other than a public vessel;

(4) "public vessel" means a vessel owned or bare-boat chartered and operated by the United States, or by a State or political subdivision thereof, or by a foreign nation, except when such vessel is engaged in commerce;

(5) "United States" means the States, the District of Columbia, the Commonwealth of Puerto Rico, the Canal Zone, Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands;

(6) "owner or operator" means (A) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, and (B) in the case of an onshore facility, and an offshore facility, any person owning or operating such onshore facility or offshore facility, and (C) in the case of any abandoned offshore facility, the person who owned or operated such facility immediately prior to such abandonment;

(7) "person" includes an individual, firm, corporation, association, and a partnership.

(8) "remove" or "removal" refers to removal of the oil from the water and shorelines or the taking of such other actions as may be necessary to minimize or mitigate damage to the public health or welfare, includ-

ing, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches;

(9) "contiguous zone" means the entire zone established or to be established by the United States under article 24 of the Convention on the Territorial Sea and the Contiguous Zone;

(10) "onshore facility" means any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land within the United States other than submerged land;

(11) "offshore facility" means any facility of any kind located in, on, or under, any of the navigable waters of the United States other than a vessel or a public vessel;

(12) "act of God" means an act occasioned by an unanticipated grave natural disaster;

(13) "barrel" means 42 United States gallons at 60 degrees Fahrenheit.

Congressional declaration of policy; prohibition against discharge of oil; exceptions; rules and regulations; determination of harmful quantities of discharged oil, notification of United States of discharge of oil; penalties for failure to notify; procedure for imposition of civil penalties for knowingly discharging oil; withholding of clearance

(b) (1) The Congress hereby declares that it is the policy of the United States that there should be no discharges of oil into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone.

(2) The discharge of oil into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone in harmful quantities as determined by the President under paragraph (3) of this subsection, is prohibited, except (A) in the case of such discharges into the waters of the contiguous zone, where permitted under article IV of the International Convention for the Prevention of Pollution of the Sea by Oil, 1954, as

amended, and (B) where permitted in quantities and at times and locations or under such circumstances or conditions as the President may, by regulation, determine not to be harmful. Any regulations issued under this subsection shall be consistent with maritime safety laws and regulations and with marine and navigation standards and applicable water quality standards.

(3) The President shall, by regulation, to be issued as soon as possible after April 3, 1977, determine for the purposes of this section, those quantities, times, locations, circumstances, and conditions, including, but not limited to, the discharge of oil, the welfare of the United States, public and private property, fish, shellfish, wildlife, and that in the case of the discharge of oil into or upon the waters of the contiguous zone, only those discharges which threaten the fishery resource, only those discharges which threaten to pollute or contaminate the contiguous zone or territory or the territorial waters of the United States may be determined to be harmful.

(4) Any person in charge of a vessel or of an onshore facility or an offshore facility shall, as soon as he has knowledge of any discharge of oil from such vessel or facility in violation of paragraph (2) of this subsection, immediately notify the appropriate agency of this subsection, immediately upon the occurrence of such discharge. Any person who fails to notify such agency shall, upon conviction, be fined not more than \$10,000, or imprisoned for not more than one year, or both. Notification received pursuant to this paragraph or both. Notification received by the Secretary of the United States Government shall not be used against any person in any criminal case, except a prosecution for perjury or for giving a false statement.

(5) Any owner or operator of any vessel, onshore facility, or offshore facility from which oil is knowingly discharged in violation of paragraph (2) of this subsection shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than \$10,000 for each offense. No penalty shall be assessed unless the owner or

operator charged shall have been given notice and opportunity for a hearing on such charge. Each violation is a separate offense. Any such civil penalty may be compromised by such Secretary. In determining the amount of the penalty, or the amount agreed upon in compromise, the appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation, shall be considered by such Secretary. The Secretary of the Treasury shall withhold at the request of such Secretary the clearance required by section 91 of Title 46, of any vessel the owner or operator of which is subject to the foregoing penalty. Clearance may be granted in such cases upon the filing of a bond or other surety satisfactory to such Secretary.

**National Contingency Plan for removal of discharged oil;
provisions; revisions; compliance**

(c) (1) Whenever any oil is discharged, into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, the President is authorized to act to remove or arrange for the removal of such oil at any time, unless he determines such removal will be done properly by the owner or operator of the vessel, onshore facility, or offshore facility from which the discharge occurs.

(2) Within sixty days after April 3, 1970, the President shall prepare and publish a National Contingency Plan for removal of oil pursuant to this subsection. Such National Contingency Plan shall provide for efficient, coordinated, and effective action to minimize damage from oil discharges, including containment, dispersal, and removal of oil, and shall include, but not be limited to—

(A) assignment of duties and responsibilities among Federal departments and agencies in coordination with State and local agencies, including, but not limited to, water pollution control, conservation, and port authorities;

(B) identification, procurement, maintenance, and

storage of equipment and supplies;

(C) establishment or designation of a strike force consisting of personnel who shall be trained, prepared, and available to provide necessary services to carry out the Plan, including the establishment at major ports, to be determined by the President, of emergency task forces of trained personnel, adequate oil pollution control equipment and material, and a detailed oil pollution prevention and removal plan;

(D) a system of surveillance and notice designed to insure earliest possible notice of discharges of oil to the appropriate Federal agency;

(E) establishment of a national center to provide coordination and direction for operations in carrying out the Plan;

(F) procedures and techniques to be employed in identifying, containing, dispersing, and removing oil; and

(G) a schedule, prepared in cooperation with the States, identifying (i) dispersants and other chemicals, if any, that may be used in carrying out the Plan, (ii) the waters in which such dispersants and chemicals may be used, and (iii) the quantities of such dispersant or chemical which can be used safely in such waters, which schedule shall provide in the case of any dispersant, chemical, or waters not specifically identified in such schedule that the President, or his delegate, may, on a case-by-case basis, identify the dispersants and other chemicals which may be used, the waters in which they may be used, and the quantities which can be used safely in such waters.

The President may, from time to time, as he deems advisable, revise or otherwise amend the National Contingency Plan. After publication of the National Contingency Plan, the removal of oil and actions to minimize damage from oil discharges shall, to the greatest extent possible, be in accordance with the National Contingency Plan.

Marine disasters; creation of a substantial threat of a pollution hazard; removal or elimination of pollution hazard; removal or destruction of vessel; employment of personnel; expenses

(d) Whenever a marine disaster in or upon the navigable waters of the United States has created a substantial threat of a pollution hazard to the public health or welfare of the United States, including, but not limited to, fish, shellfish, and wildlife and the public and private shorelines and beaches of the United States, because of a discharge, or an imminent discharge, of large quantities of oil from a vessel the United States may (A) coordinate and direct all public and private efforts directed at the removal or elimination of such threat; and (B) summarily remove, and, if necessary, destroy such vessel by whatever means are available without regard to any provision of law governing the employment of personnel or the expenditure of appropriated funds. Any expense incurred under this subsection shall be a cost incurred by the United States Government for the purposes of subsection (f) of this section in the removal of oil.

Action by United States attorney to abate actual or threatened discharge of oil from an onshore or offshore facility; jurisdiction; nature of relief

(e) In addition to any other action taken by a State or local government, when the President determines there is an imminent and substantial threat to the public health or welfare of the United States, including, but not limited to, fish, shellfish, and wildlife and public and private property, shorelines, and beaches within the United States, because of an actual or threatened discharge of oil into or upon the navigable waters of the United States from an onshore or offshore facility, the President may require the United States attorney of the district in which the threat occurs to secure such relief as may be necessary to abate such threat, and the district courts of the United States shall have jurisdiction to grant such relief as the public interest and the equities of the case may require.

Liability of owner or operator of vessel, onshore facility, or offshore facility for discharge of oil; exceptions; amount of liability; procedure for recovery

(f) (1) Except where an owner or operator can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any vessel from which oil is discharged in violation of subsection (b) (2) of this section shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil by the United States Government in an amount not to exceed \$100 per gross ton of such vessel or \$14,000,000, whichever is lesser, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. Such costs shall constitute a maritime lien on such vessel which may be recovered in an action in rem in the district court of the United States for any district within which any vessel may be found. The United States may also bring an action against the owner or operator of such vessel in any court of competent jurisdiction to recover such costs.

(2) Except where an owner or operator of an onshore facility can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any such facility from which oil is discharged in violation of subsection (b) (2) of this section shall be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil by the United States

Government in an amount not to exceed \$8,000,000, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. The United States may bring an action against the owner or operator of such facility in any court of competent jurisdiction to recover such costs. The Secretary is authorized, by regulation, after consultation with the Secretary of Commerce and the Small Business Administration, to establish reasonable and equitable classifications of those onshore facilities having a total fixed storage capacity of 1,000 barrels or less which he determines because of size, type, and location do not present a substantial risk of the discharge of oil in violation of subsection (b) (2) of this section, and apply with respect to such classifications differing limits of liability which may be less than the amount contained in this paragraph.

(3) Except where an owner or operator of an offshore facility can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any such facility from which oil is discharged in violation of subsection (b) (2) of this section shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil by the United States Government in an amount not to exceed \$8,000,000, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. The United States may bring an action against the owner or operator of such a facility in any court of competent jurisdiction to recover such costs.

**Proof by owner or operator of vessel,
onshore facility, or offshore facility of
liability of third party for discharge of oil;
exceptions to third party liability;
amount of liability; procedure for recovery**

(g) In any case where an owner or operator of a vessel, of an onshore facility, or of an offshore facility, from which oil is discharged in violation of subsection (b) (2) of this section proves that such discharge of oil was caused solely by an act or omission of a third party, or was caused solely by such an act or omission in combination with an act of God, an act of war, or negligence on the part of the United States Government, such third party shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for removal of such oil by the United States Government, except where such third party can prove that such discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of another party without regard to whether such act or omission was or was not negligent, or any combination of the foregoing clauses. If such third party was the owner or operator of a vessel which caused the discharge of oil in violation of subsection (b) (2) of this section, the liability of such third party under this subsection shall not exceed \$100 per gross ton of such vessel or \$14,000,000, whichever is the lesser. In any other case the liability of such third party shall not exceed the limitation which would have been applicable to the owner or operator of the vessel or the onshore or offshore facility from which the discharge actually occurred, if such owner or operator were liable. If the United States can show that the discharge of oil in violation of subsection (b) (2) of this section was the result of willful negligence or willful misconduct within the privity and knowledge of such third party, such third party shall be liable to the United States Government for the full amount of such removal costs. The United States may bring an action against the third party in any court of competent jurisdiction to recover such removal costs.

**Preservation of rights of owner or operator of vessel,
onshore facility, or offshore facility,
or United States against any third party**

(h) The liabilities established by this section shall in no way affect any rights which (1) the owner or operator of a vessel or of an onshore facility or an offshore facility may have against any third party whose acts may in any way have caused or contributed to such discharge, or (2) the United States Government may have against any third party whose actions may in any way have caused or contributed to the discharge of oil.

**Removal by owner or operator of vessel, onshore facility, or
offshore facility of discharged oil; suit against United States
for recovery of reasonable cost of removal; applicability to
Outer Continental Shelf Lands Act; payment of judgment**

(i) (1) In any case where an owner or operator of a vessel or an onshore facility or an offshore facility from which oil is discharged in violation of subsection (b) (2) of this section acts to remove such oil in accordance with regulations promulgated pursuant to this section, such owner or operator shall be entitled to recover the reasonable costs incurred in such removal upon establishing, in a suit which may be brought against the United States Government in the United States Court of Claims, that such discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission was or was not negligent, or of any combination of the foregoing clauses.

(2) The provisions of this subsection shall not apply in any case where liability is established pursuant to the Outer Continental Shelf Lands Act.

(3) Any amount paid in accordance with a judgment of the United States Court of Claims pursuant to this section shall be paid from the fund established pursuant to subsection (k) of this section.

Issuance of rules and regulations consistent with the National Contingency Plan; compliance; imposition of civil penalties for violations; amount

(j) (1) Consistent with the National Contingency Plan required by subsection (c) (2) of this section, as soon as practicable after April 3, 1970, and from time to time thereafter, the President shall issue regulations consistent with maritime safety and with marine and navigation laws (A) establishing methods and procedures for removal of discharged oil, (B) establishing criteria for the development and implementation of local and regional oil removal contingency plans, (C) establishing procedures, methods, and requirements for equipment to prevent discharges of oil from vessels and from onshore facilities and offshore facilities, and (D) governing the inspection of vessels carrying cargoes of oil and the inspection of such cargoes in order to reduce the likelihood of discharges of oil from such vessels in violation of this section.

(2) Any owner or operator of a vessel or an onshore facility or an offshore facility and any other person subject to any regulation issued under paragraph (1) of this subsection who fails or refuses to comply with the provisions of any such regulation, shall be liable to a civil penalty of not more than \$5,000 for each such violation. Each violation shall be a separate offense. The President may assess and compromise such penalty. No penalty shall be assessed until the owner, operator, or other person charged shall have been given notice and an opportunity for a hearing on such charge. In determining the amount of the penalty, or the amount agreed upon in compromise, the gravity of the violation, and the demonstrated good faith of the owner, operator, or other person charged in attempting to achieve rapid compliance, after notification of a violation, shall be considered by the President.

Authorization of appropriations

(k) There is hereby authorized to be appropriated to a

revolving fund to be established in the Treasury not to exceed \$35,000,000 to carry out the provisions of subsections (c), (i), and (l) of this section and section 1162 of this title. Any other funds received by the United States under this section shall also be deposited in said fund for such purposes. All sums appropriated to, or deposited in, said fund shall remain available until expended.

Administration of oil pollution control; delegation of authority by President; availability of appropriations; utilization of personnel, services, and facilities

(l) The President is authorized to delegate the administration of this section to the heads of those Federal departments, agencies, and instrumentalities which he determines to be appropriate. Any moneys in the fund established by subsection (k) of this section shall be available to such Federal department, agencies, and instrumentalities to carry out the provisions of subsections (c) and (i) of this section and section 1162 of this title. Each such department, agency, and instrumentality, in order to avoid duplication of effort, shall, whenever appropriate, utilize the personnel, services, and facilities of other Federal departments, agencies, and instrumentalities.

Enforcement of provisions

(m) Anyone authorized by the President to enforce the provisions of this section may, except as to public vessels, (A) board and inspect any vessel upon the navigable waters of the United States or the waters of the contiguous zone, (B) with or without a warrant arrest any person who violates the provisions of this section or any regulation issued thereunder in his presence or view, and (C) execute any warrant or other process issued by an officer or court of competent jurisdiction.

Jurisdiction and venue

(n) The several district courts of the United States are invested with jurisdiction for any actions, other than actions pursuant to subsection (i) (1) of this section, arising under this section. In the case of Guam, such actions may be brought in the district court of Guam, and in the case of the Virgin Islands such actions may be brought in the district court of the Virgin Islands. In the case of American Samoa and the Trust Territory of the Pacific Islands, such actions may be brought in the District Court of the United States for the District of Hawaii and such court shall have jurisdiction of such actions. In the case of the Canal Zone, such actions may be brought in the United States District Court for the District of the Canal Zone.

Existing liability for damages for oil discharge or removal not affected or modified; power of State or political subdivision thereof to impose requirements or liabilities for oil discharge not preempted; existing Federal, State, or local authority or law not affected or modified

(o) (1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency under any provision of law for damages to any publicly-owned or privately-owned property resulting from a discharge of any oil or from the removal of any such oil.

(2) Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil into any waters within such State.

(3) Nothing in this section shall be construed as affecting or modifying any other existing authority of any Federal department, agency, or instrumentality, relative to onshore or offshore facilities under this chapter or any other provision of law, or to affect any State or local law not in conflict with this section.

Financial responsibility of vessels; amount; establishment; effective date; administration of provisions; claim for costs against insurer; study and report on need for financial responsibility of vessels, and onshore and offshore facilities

(p) (1) Any vessel over three hundred gross tons, including any barge of equivalent size, using any port or place in the United States or the navigable waters of the United States for any purpose shall establish and maintain under regulations to be prescribed from time to time by the President, evidence of financial responsibility of \$100 per gross ton, or \$14,000,000 whichever is the lesser to meet the liability to the United States which such vessel could be subjected under this section. In cases where an owner or operator owns, operates, or charters more than one such vessel, financial responsibility need only be established to meet the maximum liability to which the largest of such vessels could be subjected. Financial responsibility may be established by any one of, or a combination of, the following methods acceptable to the President: (A) evidence of insurance, (B) surety bonds, (C) qualification as a self-insurer, or (D) other evidence of financial responsibility. Any bond filed shall be issued by a bonding company authorized to do business in the United States.

(2) The provisions of paragraph (1) of this subsection shall be effective one year after April 3, 1970. The President shall delegate the responsibility to carry out the provisions of this subsection to the appropriate agency head within sixty days after April 3, 1970. Regulations necessary to implement this subsection shall be issued within six months after April 3, 1970.

(3) Any claim for costs incurred by such vessel may be brought directly against the insurer or any other person providing evidence of financial responsibility as required under this subsection. In the case of any action pursuant to this subsection such insurer or other person shall be entitled to invoke all rights and defenses which would have been available to the owner or operator if an action had been brought against him by the claimant, and which would have been available to him if an action had been brought against him by

the owner or operator.

(4) The Secretary of Transportation, in consultation with the Secretaries of Interior, State, Commerce, and other interested Federal agencies, representatives of the merchant marine, oil companies, insurance companies, and other interested individuals and organizations, and taking into account the results of the application of paragraph (1) of this subsection, shall conduct a study of the need for and, to the extent determined necessary—

(A) other measures to provide financial responsibility and limitation of liability with respect to vessels using the navigable waters of the United States;

(B) measures to provide financial responsibility for all onshore and offshore facilities; and

(C) other measures for limitation of liability of such facilities;

for the cost of removing discharged oil and paying all damages resulting from the discharge of such oil. The Secretary of Transportation shall submit a report, together with any legislative recommendations, to Congress and the President by January 1, 1971.

June 30, 1948, c. 758, § 11, as added Apr. 3, 1970, Pub.L. 91-224, Title I, § 102, 84 Stat. 91.

§ 1161. Control of pollution by oil

* * * * *

Financial responsibility of vessels; amount; establishment; effective date; administration of provisions; claim for costs against insurer; study and report on need for financial responsibility of vessels, and onshore and offshore facilities

(p) (1) Any vessel over three hundred gross tons, including any barge of equivalent size, but not including any barge that is not self-propelled and that does not carry oil as cargo or fuel, using any port or place in the United States or the navigable waters of the United States for any purpose shall

establish and maintain under regulations to be prescribed from time to time by the President, evidence of financial responsibility of \$100 per gross ton, or \$14,000,000 whichever is the lesser to meet the liability to the United States which such vessel could be subjected under this section. In cases where an owner or operator owns, operates, or charters more than one such vessel, financial responsibility need only be established to meet the maximum liability which the largest of such vessels could be subjected. Financial responsibility may be established by any one of, or a combination of, the following methods acceptable to the President: (A) evidence of insurance, (B) surety bonds, (C) qualification as a self-insurer, or (D) other evidence of financial responsibility. Any bond filed shall be issued by a bonding company authorized to do business in the United States.

* * * * *

As amended Dec. 31, 1970, Pub.L. 91-611, Title I, § 120, 84 Stat. 1823.

46 U.S.C. § 183.

§ 183. Amount of liability; loss of life or bodily injury; privity imputed to owner; "seagoing vessel"

(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

(b) In the case of any seagoing vessel, if the amount of the owner's liability as limited under subsection (a) of this section is insufficient to pay all losses in full, and the portion of such amount applicable to the payment of losses in respect of loss of life or bodily injury is less than \$60 per ton of such vessel's tonnage, such portion shall be increased to an amount equal to \$60 per ton, to be available only for the payment of losses in respect of loss of life or bodily injury. If such portion so increased is insufficient to pay such losses in full, they shall be paid therefrom in proportion to their respective amounts.

(c) For the purposes of this section the tonnage of a seagoing steam or motor vessel shall be her gross tonnage without deduction on account of enging room, and the tonnage of a seagoing sailing vessel shall be her registered tonnage: *Provided*, That there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use.

(d) The owner of any such seagoing vessel shall be liable in respect of loss of life or bodily injury arising on distinct occasions to the same extent as if no other loss of life or bodily injury had arisen.

(e) In respect of loss of life or bodily injury the privity

or knowledge of the master of a seagoing vessel or of the superintendent or managing agent of the owner thereof, at or prior to the commencement of each voyage, shall be deemed conclusively the privity or knowledge of the owner of such vessel.

(f) As used in subsections (b), (c), (d), and (e) of this section and in section 183b of this title, the term "seagoing vessel" shall not include pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels or their tenders, self-propelled lighters, nondescript self-propelled vessels, canal boats, scows, car floats, barges, lighters, or nondescript non-self-propelled vessels, even though the same may be seagoing vessels within the meaning of such term as used in section 188 of this title. R.S. § 4283; Aug. 29, 1935, c. 804, § 1, 49 Stat. 960; June 5, 1936, c. 521, § 1, 49 Stat. 1479.

46 U.S.C. § 740

CHAPTER 19A.—ADMIRALTY AND MARITIME
JURISDICTION

§ 740. Extension of admiralty and maritime jurisdiction; libel in rem or in personam; exclusive remedy; waiting period

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: *Provided*, That as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948, and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: *Provided further*, That no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage. June 19, 1948, c. 526, 62 Stat. 496.

ARTICLE III UNITED STATES CONSTITUTION

SECTION 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more States; between a State and citizens of another State;—between citizens of different States;—between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects.

AMENDMENT V.

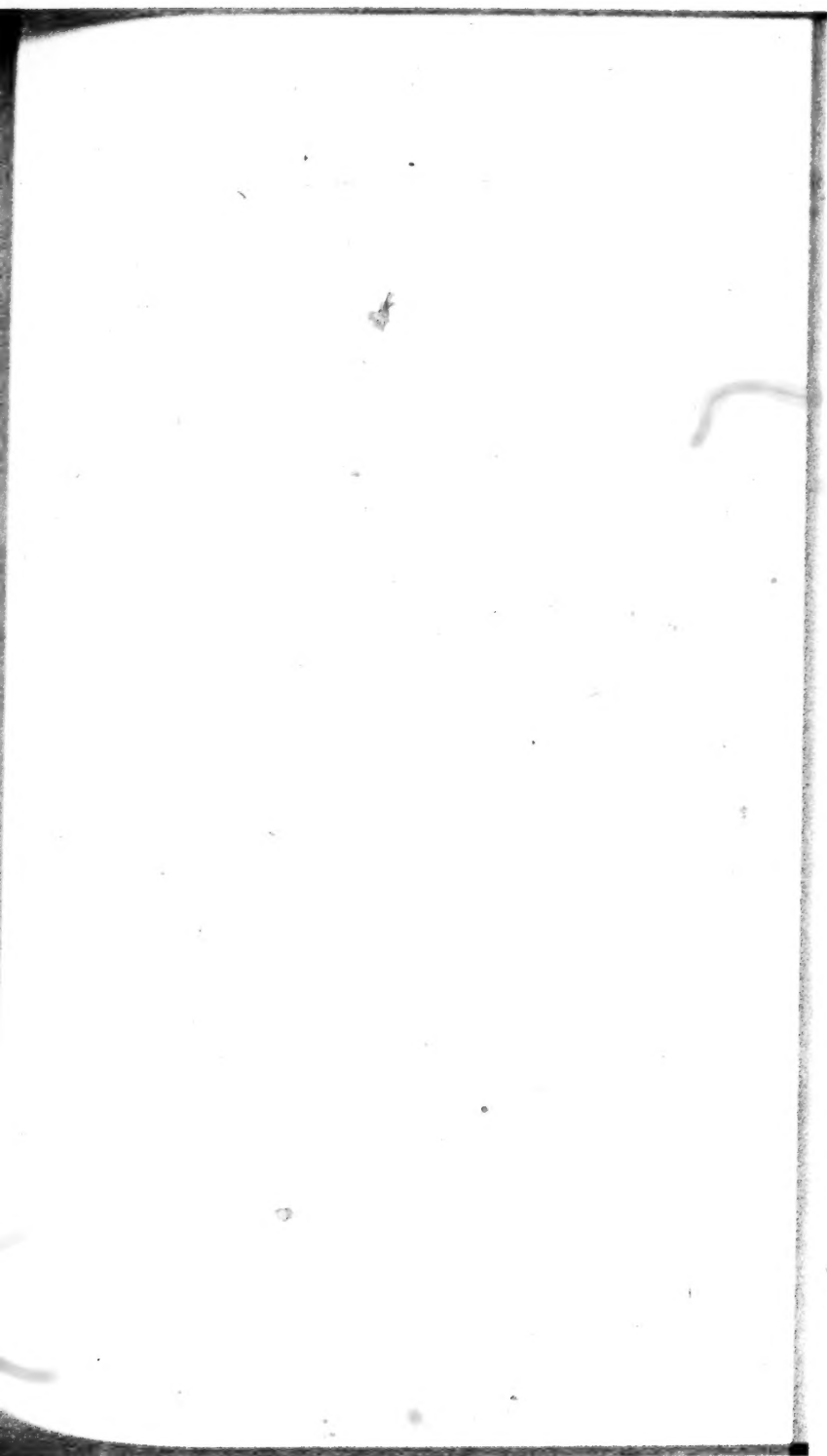
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT IX. UNITED STATES CONSTITUTION

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT X UNITED STATES CONSTITUTION

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.



IN THE
Supreme Court of the United States

Supreme Court, U.S.
FILED

FEB 22 1972

REPORT CLERK

OCTOBER TERM, 1971

No.

71-1082

REUBIN O'D. ASKEW, et al.,

Appellants,

vs.

THE AMERICAN WATERWAYS
OPERATORS, INC., et al.,

Appellees.

On Appeal from the United States District
Court for the Middle District of Florida.

JURISDICTIONAL STATEMENT

ROBERT L. SHEVIN
Attorney General

DANIEL S. DEARING
Chief Trial Counsel

Dept. of Legal Affairs
The Capitol
Tallahassee, Florida

Attorneys for Appellants.

AMICI CURIAE

Honorable William J. Baxley
Attorney General
State of Alabama
Montgomery, Alabama 36104

Honorable Evelle J. Younger
Attorney General
State of California
600 State Building
Los Angeles, California 90012

Honorable Robert K. Killian
Attorney General
State of Connecticut
30 Trinity Street
Hartford, Connecticut

Honorable W. Laird Stabler, Jr.
Attorney General
State of Delaware
Department of Justice
Wilmington, Delaware 19801

Honorable Arthur K. Bolton
Attorney General
State of Georgia
132 State Judicial Building
Atlanta, Georgia 30334

Honorable George Pai
Attorney General
State of Hawaii
State Capitol
Honolulu, Hawaii 96813

Honorable Jack P. F. Gremillion
Attorney General
State of Louisiana
P. O. Box 44005
Baton Rouge 70804

[Cont'd inside
back cover]

TOPICAL INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2-3
Statute Involved	3-4
Statement of the Case	4-11
The Questions Presented Are Substantial	11-20
Conclusion	20

TABLE OF CASES

	Page
Barracuda Tanker Corp., In re, 281 F.Supp. 228 (S.D.N.Y. 1968)	18
Berman v. Parker, 348 U.S. 26 (1954)	15
Clyde Mallory Lines v. State of Alabama, 296 U.S. 261 (1935)	15
Cooley v. Board of Port Wardens, 12 How. 299 (1851).....	15
Davis v. Department of Labor & Industries, 317 U.S. 249 (1942)	14
Day-Brite Lighting, Inc. v. State of Missouri, 342 U.S. 421 (1952)	15
Griswold v. Connecticut, 381 U.S. 79 (1965)	16
Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960)	15
Just v. Chambers, 312 U.S. 383 (1941)	14
Knickerbocker Ice Company v. Stewart, 253 U.S. 149 (1920)...	11,18
Kossick v. United Fruit Co., 365 U.S. 731 (1961)	
Lottawanna, The, 21 Wall. 558 (1875).....	11

TABLE OF CASES
(Cont'd)

	Page
Missouri v. Illinois, 180 U.S. 208 (1901)	16
Missouri v. Illinois, 200 U.S. 496 (1906)	16
Moragne v. United States Lines, Inc., 398 U.S. 375 (1970)	11
New York v. New Jersey, 256 U.S. 296 (1921)	16
Noble State Bank v. Haskell, 219 U.S. 104 (1911)	15
Norwich, The City of, 118 U.S. 468 (1886)	19
Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917)	10,14
Standard Dredging Corporation v. Murphy, 319 U.S. 306 (1943)	14
Steamer, The St. Lawrence , 1 Bl. 522 (1862)	11
United States v. Standard Oil Co., 384 U.S. 224 (1966)	16
Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), cert. den. 401 U.S. 910 (1971)	17

STATUTES

	Page
UNITED STATES CONSTITUTION	
Article III, Section 2.....	1,2,4,10 12,14
Amendment IX	16
Amendment X	15
28 U.S.C. §§ 2281, 2284(3)	2
28 U.S.C. § 1253.....	2
33 U.S.C. § 1161 et seq.....	3,4,5,6, 7,8,10, 11,17, 19,20
46 U.S.C. § 183	4,19,20
Chapter 70-244, Laws of Florida, 1970	1,3,6,7, 8,9,10, 11
Chapter 403, Florida Statutes (1970)	13
Chapter 16B-16.08, Regulations, Department of Natural Resources, State of Florida ..	3,8
International Convention For The Prevention of Pollution of the Sea by Oil (May 29, 1961), 3 U.S.T. 2989, T.I.A.S. No. 4900, 327 U.N.T.S 3	12

LAW REVIEWS & BOOKS

	Page
Comment, <u>Oil Pollution of the Sea</u> , 10 <u>Harv. Inter. L.J.</u> 316 (1969).....	13
Cowan, E., OIL AND WATER, THE TORREY CANYON DISASTER (1968) .	13
Mendelsohn, <u>Liability for Oil Pollution -- Domestic and International Law</u> , 38 <u>George Washington L. Rev.</u> 1 (Oct. 1969).....	13
Nanda, <u>The Torrey Canyon Disaster: Some Legal Aspects</u> , 44 <u>Denver L. J.</u> 400 (1967).....	13
Patterson, THE FORGOTTEN NINTH AMENDMENT, Bobbs-Merrill (1955)	16
Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution (CRISTAL)...	12
Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution (TOVALOP).....	12

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1971

No.

REUBIN O'D. ASKEW, et al.,

Appellants,

vs.

THE AMERICAN WATERWAYS
OPERATORS, INC., et al.,

Appellees.

JURISDICTIONAL STATEMENT

Appellants appeal from that final judgment with memorandum opinion and permanent injunction entered by the United States District Court, Middle District of Florida, on December 10, 1971, enjoining enforcement of the Florida Oil Spill Prevention and Pollution Control Act, Chapter 70-244, Laws of Florida, 1970, published as Chapter 376, Florida Statutes (1970), for reason that said statute violates Article III, Section 2, Clause 3 of the Constitution of the United States.

Opinion Below

The appealed Order of the United States District Court, Middle District

of Florida, has not yet been reported. A copy thereof is included herewith in the Appendix (A 1-31).

Jurisdiction

This appeal is from a final order entered in a suit for injunctive relief pursuant to 28 U.S.C. §§ 2281, 2284(3). The order was entered December 10, 1971. Notice of Appeal was filed in the United States District Court, Northern District of Florida, December 23, 1971. Jurisdiction of this Court is invoked in accordance with provisions of 28 U.S.C. § 1253, authorizing appeal from an order of a three-judge court permanently enjoining enforcement of a state statute when such order gives rise to a substantial question such as one involving conflict between state and federal interests.

Questions Presented

(1) Whether the District Court erred in declaring unconstitutional a statute designed to protect the state, its citizens, and its environment from economic and ecological damage resulting from massive pollution of its territorial waters incident to an occurrence during the transport of oil or other substances by sea, on ground that in Article III, Section 2, Clause 3, United States Constitution, the states surrendered to

the federal government all power to enact substantive legislation affecting maritime commerce.

2. Whether the District Court erred in construing the Federal Water Quality Improvement Act of 1970, Pub.L. 91-224, 91st Congress, 2d Session (April 3, 1970); 33 U.S.C. § 1161 et seq. as preempting the states from enacting legislation imposing absolute and unlimited liability upon owners or operators of vessels or terminal facilities which cause massive pollution of the state's territorial waters by oil or other substances.

Statutes Involved

Chapter 70-244, Laws of Florida, 1970, published as Chapter 376, Florida Statutes (1970), is too lengthy for inclusion verbatim, and is set out in the Appendix (A 32-41).

Chapter 16B-16.08, Regulations, Department of Natural Resources, State of Florida, promulgated in accordance with Chapter 70-244, §§ 7, 14, Laws of Florida, 1970, is set out in the Appendix (A 42-44).

The Water Quality Improvement Act of 1970, Pub.L. 91-224, 91st Congress, 2d Session (April 3, 1970), Codified as 33 U.S.C. § 1161 et seq. is also set out in appropriate part in the Appendix (A 45-56).

The Limitation of Liability Act, originally Chapter 43, Section 3, 9 Stat. 635 (March 3, 1851), amended and codified as 46 U.S.C. § 183 (1964) is set out in the Appendix (A 57).

Article III, Section 2, United States Constitution, the Ninth Amendment to the United States Constitution, and the Tenth Amendment to the United States Constitution are set out in the Appendix (A 58-59).

Statement of the Case

The Water Quality Improvement Act of 1970, Pub.L. 91-224, 91st Congress, 2d Session, 33 U.S.C. § 1161 et seq. (hereafter "W.Q.I.A." in citation; "Federal Act" in text) became law April 3, 1970, while the Florida legislature was in annual session. The Federal Act prohibits the discharge by vessels of oil into navigable waters of the United States or the contiguous zone. W.Q.I.A. §§ 11(a), (b), et seq. Should such a discharge occur through willful negligence or willful misconduct within privity or knowledge of the owner or operator of the vessel, the government may recover the entire clean-up cost from the owner or operator. W.Q.I.A. § 11(f)(1). If a discharge occurs other than from willful negligence or misconduct, the government can recover clean-up costs unless the owner or operator can prove any of four defenses: act of God, act of war,

negligence on the part of the government, or act or omission of a third party. W.Q.I.A. § 11(f)(1).

This strict liability is not without limitation, however. Recovery is limited to \$100 per gross ton of the vessel or \$14 million, whichever is less. W.Q.I.A. § 11(g). Consequential damages, or costs imposed by such a discharge on other than "the government," are not recoverable under the Federal Act.

The Federal Act also requires owners of vessels of more than 300 gross tons using United States ports or navigable waters to establish and maintain evidence of financial responsibility equal to the aforementioned limits by insurance, surety bonds, qualification as a self-insurator, or other means. W.Q.I.A. § 11(p)(1). In the event of a discharge, the government may proceed directly against the insuror who has benefit of all defenses available to the vessel owner or operator. W.Q.I.A. § 11(p)(3).

Section 11(o)(2) of the Federal Act reads:

Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil into any waters within such State.

The Florida Oil Spill Prevention and Pollution Control Act, Chapter 70-244, Laws of Florida, 1970; Chapter 376, Florida Statutes (1970) (hereafter referred to in citation by chapter number and in text as "Florida Act") was a Committee Substitute for Senate Bill No. 450 (A 32). It passed the legislature less than 90 days after the Federal Act became law, was approved by the Governor June 30, 1970, and took effect in part the following day (A 41). Provisions of the Federal Act were fresh in the minds of committee members. Federal-State cooperation is keynoted throughout the State Act.

The legislature further declares that it is the intent of this act to support and complement applicable provisions of the federal water quality improvement act of 1970¹ [1 33 U.S.C.A. § 1151 et seq.], specifically those provisions relating to the national contingency plan for removal of oil and other pollutants. Ch. 71-244, Laws of Florida, 1970, § 2(6).

Nothing in this act shall affect in any way the right of any person who renders assistance in containing or removing oil or other pollutants to reimbursement

for the costs of such containment or removal under the applicable provisions of the federal water quality improvement act of 1970¹ [1 33 U.S.C.A. § 1151 et seq.] or any rights which said person may have against any third party whose acts or omissions in any way have caused or contributed to the discharge of such oil or other pollutants. Ch. 71-244, Laws of Florida, 1970, § 8(5).

This act, being necessary for the general welfare, the public health, and the public safety of the state and its inhabitants, shall be liberally construed to effect the purposes set forth under this act and the federal water quality improvement act of 1970¹ [1 33 U.S.C.A. § 1151 et seq.]. Ch. 70-244, § 21, Laws of Florida, 1970.

Limitations of the Federal Act were also fresh in the minds of state legislative committee members who recognized gaps in protection afforded by the Federal Act, and sought to fill those gaps with safeguards peculiarly necessary to Florida. Instead of liability limited by gross tonnage of an offending vessel up to an arbitrary ceiling for pollution by oil alone, the Florida Act imposes unlimited liability without fault upon vessels discharging other pollutants as well as oil while destined for or leaving any Florida port.

Ch. 70-244 § 12, Laws of Florida, 1970. Instead of recovery limited to clean-up costs of the State alone, the Florida Act provides for damages "resulting from injury to others." Ch. 70-244, § 12. Terminal facilities, whether onshore or offshore, are subject to the same liability as vessels. Ch. 70-244, § 3(9). Owners and operators are liable, Ch. 70-244, § 12, and must maintain satisfactory evidence of financial responsibility measured by \$100 per gross ton of the largest vessel up to a \$5 million ceiling as opposed to the \$14,000,000 limit in the Federal Act. Ch. 16B-16.08, Regs. Department of Natural Resources, State of Florida; Ch. 70-244, §§ 7, 14. (A 42-44). Special containment gear and crews trained in use thereof is required, Ch. 70-244, § 7(1)(a), and vessels are subject to inspection by state officials to ascertain presence of such gear and to assess seaworthiness of the ship prior to entry into any Florida port. Ch. 70-244, § 7(c).

The effective date for regulatory requirements of the Florida Act, including financial responsibility and unlimited and absolute liability provisions, was extended by the Board of Natural Resources to March 15, 1971.

Suit was filed March 9, 1971, and a hearing on plaintiffs' application for temporary restraining order was held March 11-12, 1971.

Plaintiffs and intervenors include merchant shippers, world shipping

associations which insure an estimated three-fourths of the world's tonnage, certain members of the Florida coastal barge and towing industry, and owners and operators of oil terminal facilities and heavy industries located in Florida ports.

Defendants are members of the Cabinet of the State of Florida, before the Court in dual capacities. They were sued in their official position as highest elected officers of the state, and they were sued as members of the Board of Natural Resources. Also included are the director of the Department of Natural Resources, and a conservation officer. The State of Florida intervened as a party defendant on ground that interests to be adjudicated were much broader than those protected by the Department of Natural Resources.

At the two-day hearing on plaintiffs' application for temporary restraining order, testimony of plaintiffs' representatives revealed that not one of them had attempted to comply with the Florida Act or regulations issued thereunder, but that shippers had advised them that vessels would be diverted from Florida ports if the Act were implemented. Indeed, certain vessels had in fact been diverted to ports in other states. Testimony of an employee of the Department of Natural Resources was to the effect that some 669 vessels had been approved for traffic to and from Florida ports, their owners or operators having complied in advance with financial responsibility requirements. The temporary restraining order was subsequently entered

nunc pro tunc to March 12, 1971.

The three-judge panel was convened and heard this cause on April 27, 1971. Judgment of the District Court was entered December 10, 1971, with a memorandum opinion finding (1) that maritime law 'evolved' under Article III, Section 2 of the United States Constitution, augmented from time to time by the federal judiciary, and changed further by congressional enactment, such as the Water Quality Improvement Act of 1970; (2) that the Federal Act is 'tangible evidence' that the Florida Act is an unconstitutional intrusion into the federal maritime domain because it makes changes in substantive maritime law such as providing absolute and unlimited liability for owners and operators of offending vessels, and because it also contains provisions for compensating state and private parties for property damage as well as clean-up costs; (3) that oil-spill pollution is a maritime tort governed strictly by rules of admiralty law and is exclusively within the federal domain; (4) that since the Florida Act substitutes absolute and unlimited liability for admiralty's negligence and unseaworthiness tests and severely limited liability, it contravenes federally protected tenets of maritime law and is invalid upon the authority of Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917); (5) that to permit Florida to legislate in such fashion would be to 'sound the death knell to the principle of uniformity'; (6) that limited remedies and relief available under the Federal Act

notwithstanding, Congress did not leave 'gaps' in oil-spill pollution laws for the states to fill in -- even though the Federal Act fails to provide a remedy, the states are nonetheless precluded from creating one -- under authority of Moragne v. United States Lines, Inc., 398 U.S. 375 (1970); (7) that the pre-emption disclaimer of Section 11(o)(2) of the Federal Act does not mean what it says because Congress lacks power to permit states to legislate requirements or liabilities with respect to discharge of oil within state waters when such legislation might tend to affect -- or conflict with established rules governing -- maritime commerce, on authority of Knickerbocker Ice Company v. Stewart, 253 U.S. 149 (1920), The Lottawanna, 21 Wall. 558 (1875) and The Steamer St. Lawrence, 1 Bl. 522 (1862); and (8) that the Florida Act must fall in its entirety, despite a severability clause, because, absent fatally defective provisions, the Act 'would not comprise a coherent legislative scheme,' a point that will not be disputed on appeal.

Notice of Appeal was filed with the United States District Court, Middle District of Florida, on December 23, 1971.

Questions Presented Are Substantial

Appellants submit that the action taken, memorandum opinion, and final judgment of the District Court present

substantial questions which warrant acceptance of jurisdiction by the Court at this time.

I.

The first substantial question is whether the fact that judicial power of the United States is extended "to all Cases of admiralty and maritime jurisdiction" by Article III, Section 2 of the United States Constitution stands as a permanent barrier in the path of state legislatures seeking to protect citizens, property, ecology, economy, and general welfare from the deleterious effects of massive oil-spill pollution of state waters.

It should be noted at the outset that this appeal is not concerned with de-ballasting or tank-cleaning operations of ships at sea, peculiarly susceptible to treaty or international commercial agreement. See, International Convention For the Prevention of Pollution of the Sea by Oil, (May 29, 1961), 3 U.S.T. 2989, T.I.A.S. No. 4900, 327 U.N.T.S. 3; Tanker Owners' Voluntary Agreement Concerning Liability for Oil Pollution (TOVALOP); Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution (CRISTAL). Nor is the state concerned in this appeal with controllable pollution resulting from minor incidents such as loading spills, minor collisions, seepage, or pollution incidental to general transport

operations. Containment gear carried aboard vessels or provided at most sea-ports by port committees or the United States Coast Guard is usually adequate for control and clean-up of such minor hazards. Expenses for clean-up and any damage to the ecology is recoverable to the state under Chapter 403, Florida Statutes (1970). A suit in admiralty for any damage to private or state property would not be frustrated by limitation of liability proceedings inasmuch as the scope of such damages is severely restricted. Although pollution from such incidents is remedial under the Florida Act, the Act's focus is not so limited. The State of Florida does not appeal here from a loss of duplicate remedies. The state's concern is more urgent. It goes to the heart of the statutory scheme described in the Florida Act. The concern is for loss of a legislative attempt to protect the state, its citizens, economy, and environment against effects of a maritime disaster of Torrey Canyon proportions.¹

¹For descriptions of this occurrence and insight into its appropriateness in the instant context, see Mendelsohn, Maritime Liability for Oil Pollution--Domestic and International Law, 38 George Washington L. Rev. 1 (Oct. 1969); Comment, Oil Pollution of the Sea, 10 Harv. Inter. L.J. 316 (1969); Nanda, The Torrey Canyon Disaster: Some Legal Aspects, 44 Denver L.J. 400 (1967); E. Cowan, OIL AND WATER, THE TORREY CANYON DISASTER (1968).

A substantial question is whether Article III, Section 2 should be construed as a surrender by the state of its power and responsibility for providing such protection (a) in any case, or (b) when such is not provided by the federal government.

In holding that the State of Florida has no such power, the District Court relied, in part, on Southern Pacific Co. v. Jensen, supra, raising a question as to the valid application of Jensen outside the arena of its own facts. Standard Dredging Corporation v. Murphy, 319 U.S. 306 (1943); Davis v. Department of Labor & Industries, 317 U.S. 249 (1942); Just v. Chambers, 312 U.S. 383 (1941); and the telling dissent of Frankfurter, J., joined by Stewart, J., in Kossick v. United Fruit Co., 365 U.S. 731 (1961).

In resting one corner of its rule upon a doctrinaire allegiance to the principle of uniformity, the District Court order presents yet another substantial question: whether the once-necessary rule of uniformity in matters maritime is still of such vitality that it categorically bars state legislatures from developing new remedies to meet wrongs peculiar to our era and to the particular state; wrongs which were undreamt of when the only fuels to propel ships were wind and steam, and before such compelling state interests as protection of the economy and environment from effects of a disaster at sea (particularly for a state such as Florida whose economy depends squarely upon its environment) gave rise to new consideration

of precisely what rights, responsibilities, and powers have been surrendered by the states and by individuals to exclusive federal jurisdiction. Unless the matter falls within such jurisdiction, a requirement of "uniformity" is misplaced. Just v. Chambers, supra.

The question is inescapable: are matters such as economic welfare of the state and its citizens, and the natural environment of the state retained by the states as topics appropriate to a proper exercise of its police power, as such is recognized by the Tenth Amendment? Or were these responsibilities of government surrendered to the federal domain? If the police power of the state extends to all the great public needs, Noble State Bank v. Haskell, 219 U.S. 104 (1911); Day-Brite Lighting, Inc. v. State of Missouri, 342 U.S. 421 (1952); Cf. Berman v. Parker, 348 U.S. 26 (1954), then surely such power resides in the state to legislate protection against, and remedies for, despoilment of property of the state and its citizens and severe injury to its environment. The fact that an exercise of such police power conflicts with tenets of maritime law does not mean that the state interest protected must in all cases give way before admiralty. Because its application is felt upon navigable waters does not mean the state interest was surrendered. Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960); Cf. Clyde Mallory Lines v. State of Alabama, 296 U.S. 261 (1935); Cooley v. Board of Port Wardens (12 How. 299 (1851)).

If the Ninth Amendment protects rights peculiar to the individual beyond those specifically enumerated in the Constitution such as would vouchsafe his right to privacy, Griswold v. Connecticut, 381 U.S. 79 (1965), concurring opinion of Goldberg, J., then how can it be reasoned that the individual's right to pollution-free ocean, beaches, and estuaries is not similarly cognizable and protected by what has been referred to as the Forgotten Amendment? See, Patterson, THE FORGOTTEN NINTH AMENDMENT, Bobbs-Merrill, 1955.

This Court has recognized the deleterious effects of oil pollution of rivers and harbors, United States v. Standard Oil Company, 384 U.S. 224 (1966); New York v. New Jersey, 256 U.S. 296 (1921); Missouri v. Illinois, 200 U.S. 496 (1906); Missouri v. Illinois, 180 U.S. 208 (1901). The Standard Oil Company case involved application of a section of the Rivers and Harbors Act, 33 U.S.C. § 407, but the Court's recognition of a pollution crisis is appropriate to the instant cause. At 384 U.S. 225-226:

This case comes to us at a time in the Nation's history when there is greater concern than ever over pollution--one of the main threats to our free-flowing rivers and to our lakes as well. The crisis that we face in this respect would not, of course, warrant us in manufacturing offenses where Congress has not acted nor in stretching statutory language

in a criminal field to meet strange conditions. But whatever may be said of the rule of strict construction, it cannot provide a substitute for common sense, precedent, and legislative history. We cannot construe § 13 of the Rivers and Harbors Act in a vacuum Oil is oil, and whether useable or not by industrial standards it has the same deleterious effect on waterways. In either case, its presence in our rivers and harbors is both a menace to navigation and a pollutant.

In Zabel v. Tabb, 430 F.2d 199 (5Cir.1970) cert. den. 401 US 910(1971) Chief Judge Brown stated:

In this time of awakening to the reality that we cannot continue to despoil our environment and yet exist, the nation knows, if courts do not, that the destruction of fish and wildlife in our estuarine waters does have a devastating effect on interstate commerce. (430 F.2d at 203-204)

II.

The second area of substantial questions presented by this appeal arises from the District Court's construction of Section 11(o)(2) of the Federal Act.

The order relies upon Knickerbocker Ice Company v. Stewart, supra, for authority that since Congress is powerless to confer on the states authority to legislate within admiralty jurisdiction, the Federal Act cannot be construed as an attempt to do so. So that when the Act declares: "Nothing in this section shall be construed as preempting any State . . . from imposing any requirement or liability with respect to the discharge of oil into any waters of such State," the District Court decided that Congress meant that states are free to enforce pollution control measures so long as they are within the state's constitutional prerogative--which, of course, the state needs no congressional approval to do anyway. The effect of this interpretation is that the section is a nullity. It is a substantial question as to whether this express disclaimer of preemption is congressional recognition that States should impose "requirements or liabilities" to protect themselves against effects of oil-spill pollution of their territorial waters.

Yet another substantial question emerges from the second issue noted. The Florida Act makes owners or operators of offending vessels liable to individuals who may prove damages resulting from an oil-spill to the full amount of such damages without limitation measured by the value of the vessel plus pending freight after an occurrence such as the Torrey Canyon disaster. In re Barracuda Tanker Corp., 281 F.Supp. 228 (S.D.N.Y. 1968), modified 409 F.2d 1013 (2d Cir.

1969). The object of the Florida Act is clear: protection of the innocent property-owner, state or private citizen from loss of his property without recompense. The object of the Limited Liability Act, 46 U.S.C. 183, is equally clear. It is succinctly stated in The City of Norwich, 118 U. S. 468 (1886) at page 504:

That object was to enable merchants to invest money in ships without subjecting them to an indefinite hazard of losing their whole property by the negligence or misconduct of the master or crew, but only subjecting them to the loss of their investment.

The District Court characterized Florida's unlimited and absolute liability provisions as being directly in conflict with the Limited Liability Act and, hence, an unforgiveable intrusion into exclusive federal domain.

Of course, Congress itself pushed back the limitation of 46 U.S.C. 183 when it made owners and operators liable for the full amount of clean-up costs without regard to valuation of the vessel and pending freight under certain circumstances. W.Q.I.A. § 11(f)(1). Moreover, absent willful negligence or misconduct within privity or knowledge of the owner, the Federal Act further assaults limitations of 46 U.S.C. 183 when it provides for recovery based upon gross tonnage of the vessel up to a \$14 million ceiling instead

of the arbitrary value-of-the-vessel measuring stick where simple negligence is proven. W.Q.I.A. § 11(g).

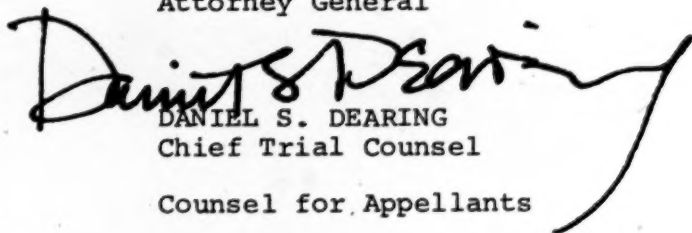
A substantial question emerges as to the continued efficacy of the Limited Liability Act in cases where the cause of action is an oil-spill. Should the State Act be precluded from following the Federal Act across former barriers of 46 U.S.C. 183? Should the Limited Liability Act continue to defeat one whose property has been damaged or destroyed through no fault of his own by barring the State from providing a remedy? Can the State Act be attacked on ground that it conflicts with the Limited Liability Act when the effect of that provision in this context is to deny an injured property-owner due process of law by shielding owners and operators from any possibility of meaningful recovery?

CONCLUSION

Appellants respectfully submit that these questions are substantial and significant to continually developing state-federal relationships, and in the framework of today's concern over problems of environmental deterioration, and that this Court should note probable jurisdiction.

Respectfully submitted,

ROBERT L. SHEVIN
Attorney General

A large, stylized handwritten signature in dark ink, which appears to read "Daniel S. Dearing". The signature is written over the typed name and title of the signatory.

DANIEL S. DEARING
Chief Trial Counsel

Counsel for Appellants

Department of Legal Affairs
The Capitol
Tallahassee, Florida

PROOF OF SERVICE

I, Daniel S. Dearing, hereby certify that on the 22nd day of February, 1972, I served copies of the foregoing Jurisdictional Statement on the several parties hereto as follows:

On Plaintiffs THE AMERICAN WATERWAYS OPERATORS, INC.; GULF ATLANTIC TOWING CORPORATION; GLIDDEN-DURKEE; DIXIE CARRIERS, INC.; OIL TRANSPORT COMPANY, INC.; NATIONAL MARINE SERVICE, INC.; THE REVILO CORPORATION; EASTERN SEABOARD PETROLEUM COMPANY, INC.; STEUART TRANSPORTATION COMPANY; INTERSTATE OIL TRANSPORT COMPANY; FEDERAL BARGE LINES, INC., by mailing two copies to Ervin, Pennington,

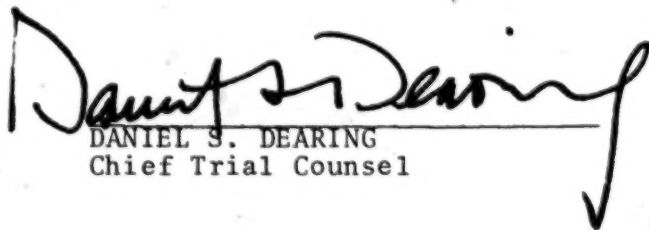
Varn & Jacobs, Attorneys for Original Plaintiffs, P. O. Box 1170, Tallahassee, Florida 32302;

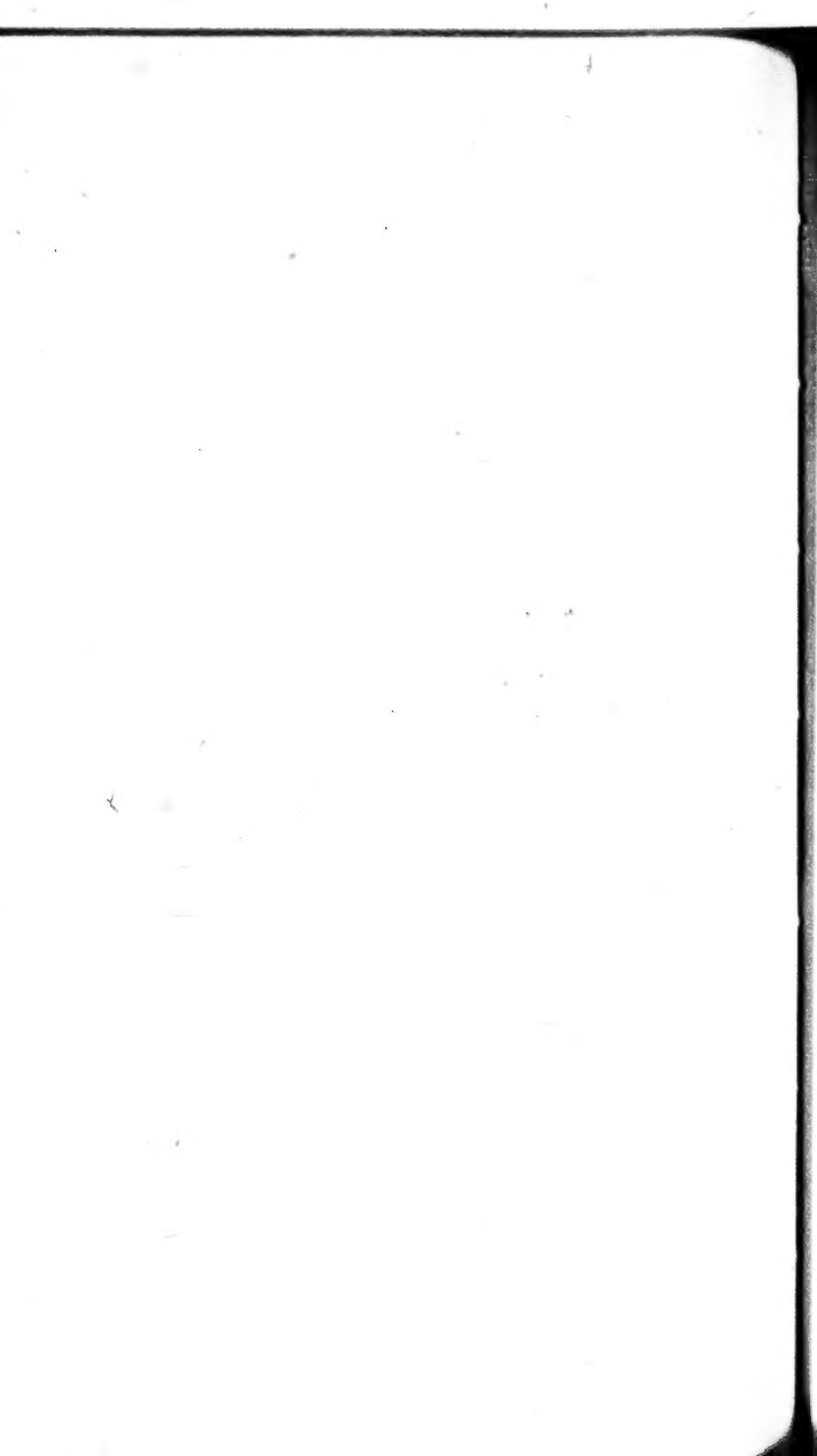
and

On Intervening Plaintiffs SUWANNEE STEAMSHIP CO. and COMMODORES POINT TERMINAL CORPORATION by mailing two copies to KURZ, TOOLE, TAYLOR, MOSELEY & GABEL, Attorneys for the above-named Intervening Plaintiffs, Suite 1014 Barnett Bank Building, 112 West Adam Street, Jacksonville, Florida 32202; and

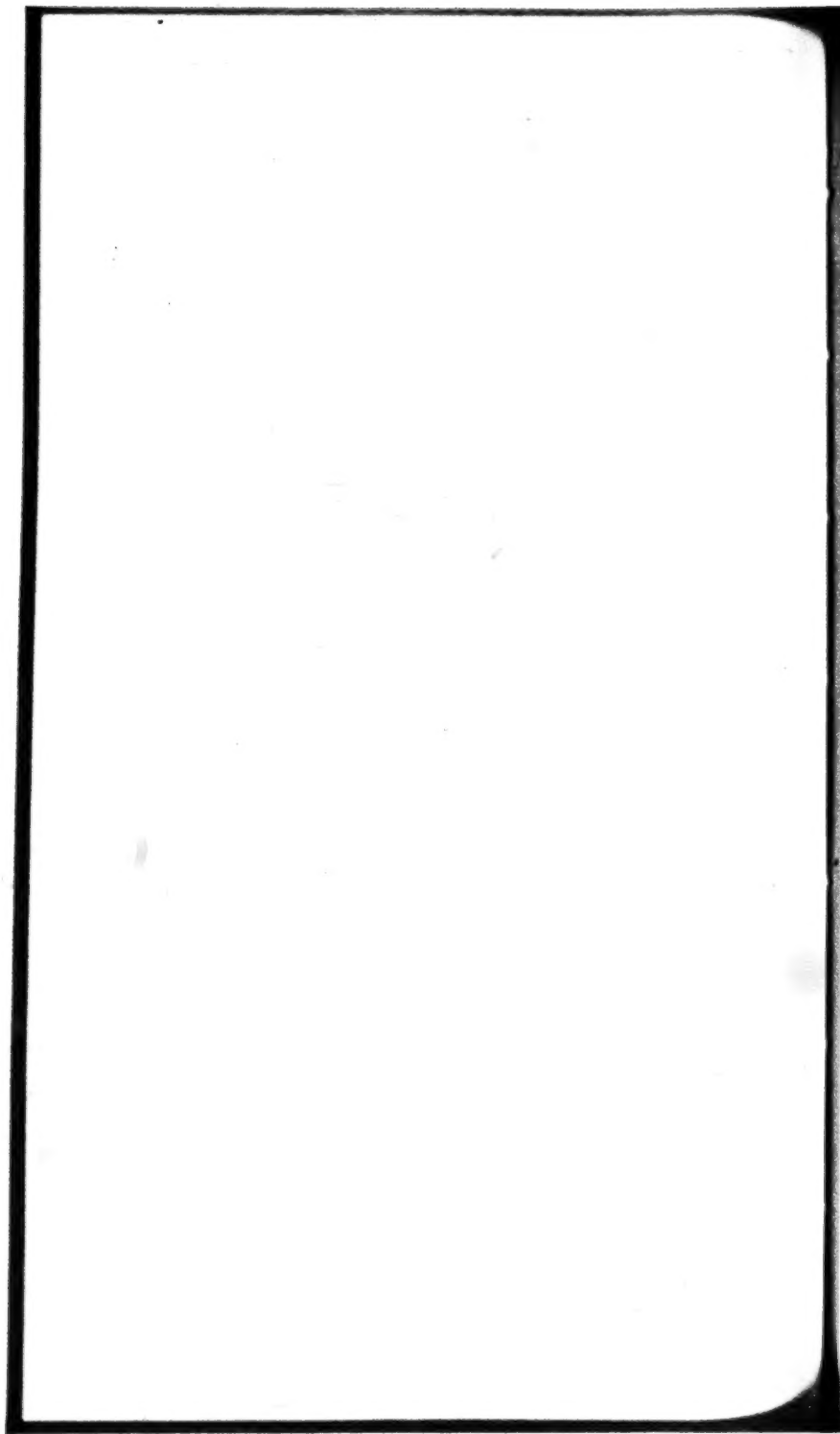
On Intervening Plaintiffs AMERICAN INSTITUTE OF MERCHANT SHIPPING; ASSURANCE FORENINGEN GARD; ASSURANCE FORENINGEN SKULD; THE BRITANNIA STEAM SHIP INSURANCE ASSOCIATION, LIMITED; THE JAPAN SHIP OWNERS MUTUAL PROTECTING AND INDEMNITY ASSOCIATION LIMITED; THE LONDON STEAM-SHIP OWNERS' MUTUAL INSURANCE ASSOCIATION, LIMITED; NEWCASTLE PROTECTION AND INDEMNITY ASSOCIATION; THE NORTH OF ENGLAND PROTECTING & INDEMNITY ASSOCIATION, LIMITED; THE STANDARD STEAMSHIP OWNERS' PROTECTION & INDEMNITY ASSOCIATION; THE STANDARD STEAMSHIP OWNERS' PROTECTION AND INDEMNITY ASSOCIATION (BERMUDA), LIMITED; THE STEAMSHIP MUTUAL UNDERWRITING ASSOCIATION, LIMITED; SUNDERLAND STEAMSHIP PROTECTING AND INDEMNITY ASSOCIATION: SVERIGES ANGFARTYGS ASSURANSFORENING; THE UNITED KINGDOM MUTUAL STEAM SHIP ASSURANCE ASSOCIATION (BERMUDA), LIMITED; THE WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION AND

INDEMNITY ASSOCIATION (LUXEMBOURG); and their respective members, by mailing two copies to them c/o Fowler, White, Gillen, Humkey, Kinney & Boggs, P. O. Box 1438, Tampa, Florida 33601; Haight, Gardner, Poor & Havens, 80 Broad Street, New York, New York 10004; and Healy & Baillie, 29 Broadway, New York, New York 10006, Attorneys for the above-named Intervening Plaintiffs.


DANIEL S. DEARING
Chief Trial Counsel



A P P E N D I X



UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 71-156-Civ-J

THE AMERICAN WATERWAYS OPERATIONS,
INC., et al.,

Plaintiffs

and

SUWANNEE STEAMSHIP CO., et al.,

Intervening Plaintiffs,

vs.

REUBIN O'D. ASKEW, et al.

Defendants

MEMORANDUM OPINION
AND FINAL JUDGMENT

Before, RONEY, Circuit Judge, and
SCOTT and TJOFLAT, District Judges.

TJOFLAT, District Judge:

During the 1970 session the Florida Legislature passed the "Oil Spill Prevention and Pollution Act"¹ (hereinafter called the "Florida Act") in an attempt to prevent pollution by the shipping industry of waters within the territorial jurisdiction of the State of Florida. The Act imposes unlimited liability without fault upon virtually any vessel which discharges oil or any other pollutant while destined for or leaving any Florida port.² Onshore and offshore terminal facilities are subject to the same liability.³ The Act requires every owner or operator of a vessel using a Florida port or a terminal facility to pay whatever clean up costs or damages may result from the discharge of pollutants⁴ and to maintain satisfactory evidence of financial responsibility to satisfy such liability.⁵ The Department of Natural Resources is empowered to require any vessel transporting a pollutant in state waters to be equipped with specified containment gear and a crew trained in its use.⁶ Prior to entering a Florida port, every vessel is subject to inspection by the port manager to determine the presence of the required contain-

ment gear and the seaworthiness of the ship.⁷ He is required to notify all other ports in the state of any vessel refused entry to his port.⁸

Plaintiffs and intervenors include merchant shippers whose vessels use Florida ports in the course of transporting goods in foreign and interstate commerce; world shipping associations who insure three-fourths of the ocean-going tonnage against, among other things, liability for oil spillage; a substantial portion of the barge and towing industry operating along the Florida coast; and owners of oil terminal facilities located in Florida ports. They have challenged the validity of the Florida Act on several federal constitutional grounds. Plaintiffs' initial contention is that Florida has sought to legislate substantive maritime law which, under the United States Constitution, is exclusively within the federal domain. Secondly, they contend that the Act violates the Commerce Clause, since it seeks to regulate foreign and interstate commerce. Certain provisions of the Act are under piecemeal attack on Fourteenth Amendment due process and equal protection grounds. The resolution of the first of these contentions dictates the decision in this case, and the others will not be discussed.

The maritime law of the United States has evolved under Article 3, Section 2, of the Constitution which extends the judicial power of the United States "to all Cases of admiralty and maritime jurisdiction." In a territorial sense that jurisdiction covers all waters navigable in interstate or foreign commerce, including state waters.⁹ Maritime law governs virtually every facet of the shipping industry from the design and construction of vessels to the regulation of their day to day operations and the transactions in which they engage. It comprises traditional admiralty rules and concepts found initially in the European authorities. These rules and concepts have been augmented from time to time by the federal judiciary to accommodate needs distinctive to this nation. Further changes in the corpus of maritime law have been effected by a variety of congressional enactments and administrative regulations.¹⁰ One of these congressional enactments is the Water Quality Improvement Act of 1970¹¹ (hereinafter called "W.Q.I.A.") which became law a few months prior to the effective date of the Florida Act. W.Q.I.A. provides plaintiffs with tangible evidence that the Florida Act is an unconstitutional intrusion into the federal maritime domain.

The W.Q.I.A. reinforces the national ant-water pollution policy. In this act Congress declared that there should be no discharge of oil into or upon the navigable waters and shorelines of the United States. The owner or operator of a vessel or an onshore or offshore facility is subject to limited liability without fault for the costs expended by the government in cleaning up an oil spill.¹³ Where the spillage results from willful negligence or misconduct, however, liability for such costs can be unlimited.¹⁴ Evidence of financial responsibility sufficient to cover its potential liability must be given by any vessel of 300 gross tons or more that uses the navigable waters of the United States.¹⁵ Additionally, the President is authorized to issue regulations requiring, among other things, that vessels maintain oil spill prevention equipment and be subject to boarding for inspection purposes at any time.¹⁶

In adopting W.Q.I.A. Congress anticipated that all hazardous substances, in addition to oil, capable of polluting navigable waters would be subject to similar legislative treatment.¹⁷ W.Q.I.A. required the President to promulgate regulations defining such hazardous substances and establishing methods and means for their removal.¹⁸ He was also required to report to Congress, by

November 1, 1970, on the desirability of enacting legislation to establish liability for the cost of removing hazardous substances discharged from vessels and onshore and offshore facilities.¹⁹

That the Florida Act constitutes unlawful intrusion into the exclusive federal admiralty domain is apparent when one observes the extent to which that act would change substantive maritime law. The most obvious changes would be in the liability now imposed by W.Q.I.A. and maritime rules on shippers and the operators of onshore and offshore facilities.

While both W.Q.I.A. and the Florida Act subject vessels and onshore and offshore facilities to strict liability for cleanup costs, the latter imposes a far greater measure of responsibility. For example, W.Q.I.A. would excuse a shipper who demonstrates that the oil spill was caused by act of God, an act of war, or the act or omission of a third party.²⁰ The Florida Act recognizes none of these defenses to a claim by the state for cleanup costs. The state is entitled to judgment simply by pleading and proving "the fact of the prohibited discharge."²¹ Moreover, the amount of the recovery would be unlimited; whereas W.Q.I.A.

would place a limit on exposure, as we have previously noted.²²

There is perhaps an even greater contrast between maritime law and the Florida Act in compensating state or private interests for property damage, as distinguished from cleanup costs. W.Q.I.A. creates responsibility for cleanup costs only and leaves undisturbed the remedies available under maritime law for private injury caused by oil spillage or other pollution. The federal courts have long considered oil pollution as a maritime tort for which damages may be awarded.²³ Compensation is recoverable for injury to property and allowances have even been made for consequential damages. In In re New Jersey Barging Corp.,²⁴ an oil spill case, the court approved the following language from the Commissioner's report:

In the light of the ... authorities, it would seem to the Commissioner that he is authorized, and in fact required, to make award of compensation for such annoyance, inconvenience and discomfort suffered by particular claimants to the extent of and in an amount commensurate with the annoyance and discomfort proven.

The recovery of damages in such cases is predicated on proof of negligence or unseaworthiness. The owner of a seaworthy vessel would not be liable, for example, if he encountered an extraordinary peril which resulted in a non-deliberate and non-negligent pollution of the shoreline. Even if fault was established, the vessel owner's financial responsibility for property damage would be limited to the value of the vessel at the end of the voyage, plus the "freight then pending," unless the damage was caused with the owner's "privity or knowledge."²⁵

Under the Florida Act, however, liability without fault is the foundation for "damage insured by the state and for damage resulting from injury to others," just as it is in the case of cleanup costs. By substituting absolute liability for proof of negligence or unseaworthiness as a condition to unlimited recovery, the Florida Act, if valid, would materially change the substantive maritime law governing the disposition of claims arising from the pollution of coastal waters.

It is well settled that state legislation is invalid where it is in contravention with general admiralty rules or congressional enactments in

the maritime field. In the landmark Jensen case,²⁶ the Supreme Court, in holding that the New York State Workmen's Compensation Statute could not constitutionally be applied where an accidental death occurred on a vessel afloat in navigable waters within New York's boundaries, said:

And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself.²⁷

* * *

If New York can subject foreign ships coming into her ports to such obligations as those imposed by her Compensation Statute, other States may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitu-

tion was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded. . . . The legislature exceeded its authority in attempting to extend the statute under consideration to conditions like those here disclosed. So applied, it conflicts with the Constitution and to that extent is invalid.²⁸

The Florida Act here constitutes a far greater intrusion into the federal maritime domain than the New York statute in the Jensen case. If applied to the plaintiffs and intervenors in this case, the Florida Act would effect-- in the words of Jensen-- the "destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded."

This is not a situation in which a state legislature has sought to act in an area of purely local concern and its enactment is no real encroachment on federal interests. Rather, this is a case where the State purports to impose upon shipping and related industries duties which under the federal law they do not bear. It can hardly be said that Florida is not seeking to regulate conduct in the federal maritime jurisdiction. We

need not belabor the point that to permit the states severally to regulate these industries as Florida seeks to do would sound the death knell to the principle of uniformity.

Defendants argue that, to the extent the Florida Act goes beyond W.Q.I.A., it fill (sic) a "void" in the maritime law and is justifiable under the "gap theory."²⁹ This theory presupposes that maritime law is an incomplete system, with numerous gaps that can be filled by state statutes. This is to say, if the maritime law affords no remedy, the states may provide one. The Supreme Court's recent decision in Moragne v. States Marine Lines, Inc.³⁰ clearly puts such a theory to rest.

In that case the Court had before it the question of the applicability of the Florida Wrongful Death Statute³¹ to a claim arising out of the death of a longshoreman killed while working aboard a vessel in navigable waters within the State of Florida. Neither the general maritime law nor Congressional enactment provided a remedy in the situation. The District Court and the Court of Appeals, citing The Tungus v. Skovgaard,³² held that the state statute should be invoked to provide the remedy as well as the basis for recovery, that is, negligence.

Under maritime law, however, States Marine Lines owed plaintiff's decedent the duty to provide a seaworthy vessel in addition to the duty to exercise due care. Plaintiff therefore argued that an action was maintainable for a breach of either duty.

The Supreme Court rejected the notion that the absence of a federal statute or a maritime rule on the subject compelled the conclusion that state law must govern. It held that admiralty was fully capable of fashioning a remedy for the breach of substantive duties imposed by general maritime law and thus directed the district court to shape the remedy on remand. At the same time the Court observed that the Florida law of negligence has no place in the maritime field. The decision clearly reinforced the policy of uniformity and is an indication that admiralty cannot tolerate the inconsistency inherent in accommodating state remedial statutes to exclusively maritime substantive concepts.

Another argument advanced by defendants is that the Florida Act is valid under the following provision of W.Q.I.A.:

Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to

the discharge of oil into any waters within such State.
33 U.S.C. §1161(o) (2).

It has long been recognized that Congress is powerless to confer on the states authority to legislate within the admiralty jurisdiction [Knickerbocker Ice Company v. Stewart, 253 U.S. 149 (1920);³³ The Lottawanna, 21 Wall. 558 (1875); The Steamer St. Lawrence, 1 Bl. 522 (1862)] and we cannot presume that W.Q.I.A. was an attempt to do so. There is nothing in the language of the act which purports to grant any such legislative authority to the states. The statement that Congress did not intend to preclude state imposed liability for oil pollution simply means that the states are free to enforce pollution control measures that are within their constitutional prerogative.

For the foregoing reasons we conclude that the Florida Act in question cannot constitutionally be applied to the plaintiffs and intervenors and to the activities in which they engage. The question thus arises as to whether the Act is severable. Although it contains a severability clause,³⁴ such a provision is by no means binding on a court empowered to determine the constitutionality of a statute. The rule was explained by the Supreme

Court in Carter v. Carter Coal Co.:

Whether the provisions of a statute are so interwoven that one being held invalid the others must fall, presents a question of a statutory construction and of legislative intent, to the determination of which the statutory provision becomes an aid. "But it is an aid merely; not an inexorable command." Dorchy v. Kansas, 264 U.S. 286, 290. The presumption in favor separability does not authorize the Court to give the statute "an effect altogether different from that sought by the measure viewed as a whole." Railroad Retirement Bd. v. Alton R. Co., 295 U.S. 330, 362.

The statutory aid to construction in no way alters the rule that in order to hold one part of a statute unconstitutional and uphold another part as separable, they must not be mutually dependent upon one another.

When a federal court is called upon to rule on the constitutionality of a state statute containing a severability clause, the court will look to the decisions of the state court on the effect of such a clause.³⁶ In Cramp v. Board of Public Instruction³⁷ the Supreme Court of Florida made the

following pronouncement on the question of severability:

The rule is well established that the unconstitutionality of a portion of a statute will not necessarily condemn the entire act. When a part of a statute is declared unconstitutional the remainder of the act will be permitted to stand provided: (1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other and, (4) an act complete in itself remains after the invalid provisions are stricken.³⁸

In the Florida Act there are no provisions which, though standing by themselves might be considered unobjectionable, are not so interwoven in purpose and scheme with the invalid provisions of the Act as to permit the operation of the severability clause. The announced intent of the Florida Legislature was to "deal with the hazards and threats of danger and damage posed by . . . transfer of pollutants between vessels, between onshore facilities and vessels,

and between offshore facilities and vessels within the jurisdiction of the state and state waters. . . . "39 Each provision of this statute was enacted to realize this intent and each would affect the industries in which plaintiffs and intervenors engage. The provisions that do not directly frustrate the federal maritime law are so few that, considered together, they would not comprise a coherent legislative scheme. Accordingly, the Act in its entirety must fall.

In consideration of the foregoing, it is

ORDERED:

1. Chapter 70-244, Laws of Florida, as amended in Chapter 376, Florida Statutes Annotated, is hereby declared to be in violation of Article III, Section 2, Clause 3 of the Constitution of the United States and is therefore null and void and without effect.

2. The temporary restraining order entered by Judge Charles R. Scott on March 19, 1971, enjoining the enforcement of said chapter and any regulations promulgated thereunder is hereby made permanent; provided that nothing in this final judgment shall be construed to prohibit the defendants from continuing to pay salaries of current employees out of the Coastal Protection Trust Fund.

3. This memorandum opinion and final judgment shall constitute the final judgment of this Court as to all issues presented in this action.

DONE AND ORDERED at Jacksonville,
Florida, this 10th day of December,
1971.

s/ Gerald Bard Tjoflat
UNITED STATES DISTRICT JUDGE

FOR THE COURT

FOOTNOTES

1. Chapter 376, Florida Statutes Annotated; Chapter 70-244, Laws of Florida (all further citations to the act will be to Florida Statutes Annotated).

2. Sections 376.12, Florida Statutes Annotated, provides in part:

Liabilities of licensees.--
Because it is the intent of this chapter to provide the means for rapid and effective cleanup and to minimize damages, any licensee and its agents or servants, including vessels destined for or leaving a licensee's terminal facility, who permits or suffers a prohibited discharge or other polluting condition to take place within state boundaries shall be liable to the state for all costs of cleanup or other damage incurred by the state and for damages resulting from injury to others. In any suit to enforce claims of the state under this chapter, it shall not be necessary for the state to plead or prove negligence in any form or manner on the part of the licensee or any vessel. If the state is damaged by a discharge prohibited by this chapter it need only plead and prove the fact of the prohibited

discharge or other polluting condition and that it occurred.

"'Pollutants' shall include, but not be limited to, oil of any kind and in any form, gasoline, pesticides, ammonia, chlorine, and other hazardous materials." Fla. Stat. Ann. §376.031(7).

3. Terminal facilities and vessels are defined as:

"Terminal facility" means any water front facility of any kind, other than vessels not owned or operated by such facility, and related appurtenances located on land, including submerged lands, or on or under the surface of any kind of water, which facility and related appurtenances are used or capable of being used for the purpose of drilling for, pumping, storing, handling, transferring, processing, or refining oil or other pollutants, including, but not limited to, any such facility and related appurtenances owned or operated by a public utility or a governmental or quasi-governmental body. A vessel shall be considered a terminal facility only in the event of a ship-to-ship transfer of oil, petroleum products or their by-products, and other pollutants, and only that vessel going to or coming from the place of transfer and

the terminal facility. With respect solely to application fees for licenses and annual license fees as required in this act, the words "terminal facility" shall not be construed to include the fuel storage tanks or other facilities of any marine service station having no more than twelve hundred (1200) gallons of pollutants in storage on the premises. Fla. Stat. Ann. §376.031(9) as ammended, Laws of Florida, 71-243.

"Vessel" includes every description of watercraft or other contrivance used, or capable of being used, as a means of transportation on water, whether self-propelled or otherwise, and includes barges and tugs. Fla. Stat. Ann. §376.031(12).

4. See note 2, supra.

5. Section 376.14, Florida Statutes Annotated, provides, in part:

(1) Each owner or operator of a terminal facility or vessel, including any barge, using any port in Florida shall establish and maintain under rules and regulations prescribed by the department of natural resources, evidence of financial responsibility based on the capacity of the terminal facility or tonnage

of the ship, the cargo carried, and other similar factors to which the vessel could be subjected under this chapter.

Financial responsibility may be established and maintained by any one (1), or a combination, of the following methods acceptable to the department:

(a) Evidence of insurance;

(b) Surety bonds payable to the governor of the state, conditioned to pay all costs and expenses of the cleanup of any discharge as well as damages caused to the state and any person;

(c) Qualification as a self-insurer; or

(d) Other evidence of financial responsibility satisfactory to the department.

(2) A bond filed with the department shall be issued by a bonding company authorized to do business in the state.

(3) Any claim for costs incurred by a terminal facility or vessel may be brought directly against the insurer or any other person providing evidence of financial responsibility.

Any claim for costs of cleanup, civil penalties, or damages by the state, and any claim for damages by any injured person, may be brought directly against the bond, the insurer, or any other person providing evidence

of financial responsibility.

6. Section 376.07, Florida Statutes Annotated, provides in part:

Regulatory powers of department.--The department shall from time to time adopt, amend, repeal, and enforce reasonable regulations insofar as they relate to oil spills or discharges or the spills or discharges of other pollutants into the waters of this state or onto the coasts of this state.

(1) The regulations shall be adopted in accordance with the administrative procedure act, chapter 120.

(2) The department shall adopt regulations including, but not limited to, the following matters:

(a) Operation and inspection requirements for facilities, vessels, personnel, and other matters relating to licensee operations under this chapter, and specifically requiring that vessels transporting pollutants within state waters shall maintain on board such containment gear as may be required by the department with a crew trained in the use of the gear.

(b) Procedures and methods of reporting discharges and other occurrences prohibited

by this chapter.

(c) Procedures, methods, means, and equipment to be used by persons subject to regulation by this chapter in the removal of pollutants.

* * *

(f) Requirements for minimum weather and sea conditions for permitting a vessel to enter port and for the safety and operation of vessels, barges, tugs, motor vehicles, motorized equipment, and other equipment relating to the use and operation of terminals, facilities, and refineries, the approach and departure from terminals, facilities, and refineries and requirements that containment gear approved by the department be on hand and maintained by terminal facilities and refineries with adequate personnel trained in its use.

(g) Requirements that, prior to being granted entry into any port in this state, the master of a vessel shall report:

(1) Any discharges of oil or other pollutants the vessel has had since leaving the last port;

(2) Any mechanical problem on the vessel which creates the possibility of a spill; and

(3) Any denial of entry

into any port during the current cruise of the vessel.

7. Section 376.08(2), Florida Statutes Annotated, provided:

The port manager shall have the authority to board any vessel prior to its entry into port in order to ascertain the seaworthiness of the vessel and the presence of required containment gear. Upon being notified of a discharge the port manager shall have authority to direct the vessel to anchor immediately or move to a specific dock and deploy containment gear or to move to the open seas and to take such other measures as he deems necessary. The port manager shall have the additional duty to inspect any terminal facility in his port to determine that adequate containment gear is on hand at the terminal facility.

8. Section 376.08(3), Florida Statutes Annotated, provides:

A port manager who refuses entry of any vessel into the port under his charge shall be required to notify all other ports in the state of his refusal of entry of that vessel.

9. "[T]he admiralty jurisdiction of the United States extends

to all waters, salt or fresh, with or without tides, natural or artificial, which are in fact navigable in interstate or foreign water commerce, whether or not the particular body of water is wholly within a state, and whether or not the occurrence or transaction that is the subject matter of the suit is confined to one state." Gilmore and Black, The Law of Admiralty, §1-11, at 28-29 (1957) and cases cited therein.

Arguably, this would include land-locked lakes which are "navigable-in-fact" in interstate commerce.

10. The "Necessary and Proper Clause" of the United States Constitution (Article I, Section 8, Clause 18), read in context with the "Admiralty Clause" (Article III, Section 2, Clause 3) confers upon Congress the power to enact legislation in the maritime field. Knickerbocker Ice Company v. Stewart, 253 U.S. 149 (1920); Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917).

11. 33 U.S.C. §1161 et seq.

12. 33 U.S.C. §1161(b)(1).

13. The amount of liability of a vessel is limited to \$100 per gross ton or \$14,000,000, which is less. The liability of an onshore or offshore facility is limited to \$8,000,000. 33 U.S.C. §1161(f)(1), (2) and (3).

14. 33 U.S.C. §1161(f)(1), (2) and (3).

15. 33 U.S.C. §1161(p).

16. 33 U.S.C. §1161(j).

17. 33 U.S.C. §1162.

18. Id.

19. Id.

20. 33 U.S.C. §1161(f).

21. See note 2, supra. Section 376.11 establishes the Florida Coastal Protection Fund. One of the purposes of the fund is to provide moneys to be used by the Department of Natural Resources in cleaning up oil spills. The state's recovery of cleanup costs--by simply pleading and providing the fact of a discharge under Section 376.12--provides revenue for the fund. If the party causing the oil spill wants to contend that the discharge was caused by an act of God, for example, he must petition the department after he has been held liable for the cleanup costs. If the Department, in the exercise of its discretion, concludes that the contention is well made, it may waive the State's right to reimbursement of the cleanup cost. Whether the petition is granted or not is a matter solely for the Department to decide, for its decision on the merits is not subject to judicial review, as Section 376.11(6)(b) provides:

"The findings of the department as it is the legislative intent

that the waiver provided in this paragraph is a privilege conferred, not a right granted."

22. See notes 2 & 13 supra and accompanying text. The potential for conflict is equally present between the regulatory scheme envisioned by the Florida Act and present regulation under federal acts. Pursuant to the W.Q.I.A. the President was required to publish a National Contingency Plan to remove oil spills and to minimize damage and to promulgate regulations "consistent with maritime safety and with marine and navigation laws." 33 U.S.C. §1161(c), (j). These regulations are to cover, for example, the establishment of "procedures, methods, and requirements for equipment to prevent discharges of oil from vessels and from onshore facilities and offshore facilities and . . . governing the inspection of vessels carrying cargoes in order to reduce the likelihood of discharges of oil from such vessels. . . ." 33 U.S.C. §1161(j).

The Florida Act obligates the Department of Natural Resources to act in the same areas. See note 6 supra. The potential for conflict in these two regulatory schemes is obvious.

It is likely that regulations promulgated under the Florida Act would further be discordant with the Steamboat Inspection Act, Title 46, U.S.C. §361 et seq., and regulations promulgated there-

under. Section 376.08(2), Florida Statutes Annotated, provides that

"[t]he port manager shall have authority to board any vessel prior to its entry into port in order to ascertain the seaworthiness of the vessel and the presence of the required containment gear."

At the same time the Steamboat Inspection Act, together with the regulations issued pursuant thereto, sets up a detailed and comprehensive scheme, administered by the United States Coast Guard, for maintenance, inspection, and regulation of all vessels (except motor boats, which are otherwise provided for) propelled in whole or in part by mechanical or electrical power in the navigable waters of the United States. 46 U.S.C. §§361-62. The Federal scheme is in consonance with the International Convention for the Safety of Life at Sea, 1960, T.I.A.S., 16 U.S.T. 185, 536 U.N.T.S. 27, which has been ratified or adhered to by all maritime nations, including the United States. Here again, conflict between the regulations under the Florida Act and the federal law appears unavoidable.

23. See, e.g., Fireman's Fund Ins. Co. v. Standard Oil Co., 339 F.2d 148 (9th Cir. 1964); Salaky v. Atlas Barge No. 3, 208 F.2d 174 (2nd Cir. 1953); California v. The Bournemouth, 307 F.Supp. 922 (C.D.Cal. 1969); Petition of New Jersey Barging Corp., 168 F.Supp. 925 (S.D.N.Y. 1958). Since the Congressional enactment of the Admiralty Extension Act in 1948 (46 U.S.C.

§740) "all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land" (emphasis added) are considered maritime torts and thus within the admiralty jurisdiction. Petition of New Jersey Barging Corp., supra.

24. 168 F.Supp. 925, 937 (S.D.N.Y. 1958).

25. United States Limited Liability Act, 46 U.S.C. §183 et seq. No state statute can override this "Limitation Statute" within the territorial jurisdiction of the federal maritime law. In Butler v. Boston & Savannah Steamship Co., 130 U.S. 527, 555 (1889), the Supreme Court observed:

"The law of limited liability, as we have frequently had occasion to assert, was enacted by Congress as a part of the maritime law of this country, and therefore it is co-extensive, in its operation, with the whole territorial domain of that law."

In holding that a Massachusetts wrongful death action, arising from a death occurring in the admiralty jurisdiction, was subject to the "Limitation Statute", the Court went on to say:

"It is unnecessary to consider the force and effect of the statute of Massachusetts over the place in question. Whatever force it may have in creating liabilities for acts done there, it cannot neutralize

or affect the admiralty or maritime jurisdiction or the operation of the maritime law in maritime cases. Those are matters of national interest. If the territory of the state technically extends a marine league beyond the seashore, that circumstance cannot circumscribe or abridge the law of the sea." 130 U.S. at 557-58.

26. Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917).
27. Id. at 216.
28. Id. at 217-18.
29. See, Currie, "Federalism and the Admiralty," The Supreme Court Review 1960, 158 at 166-73.
30. 398 U.S. 375 (1970).
31. Fla. Stat. Ann. §768.01.
32. 358 U.S. 588 (1959).
33. In the Knickerbocker case the Court, speaking to the question of state legislative authority in the maritime field, said:
 "The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them and other

matters within the admiralty and maritime jurisdiction. Moreover, it took from the States all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations." 253 U.S. at 160-61. (Emphasis added).

34. Laws of Florida, 70-244 §23.
35. 298 U.S. 238, 313 (1936).
36. Watson v. Buck, 313 U.S. 387 (1941).
37. 137 So.2d 828 (Fla. 1962).
38. Id. at 830.
39. Fla. Stat. Ann. §376.021(3)(a), (4)(a).

Ch. 70-244 SECOND REGULAR SESSION**AIR AND WATER POLLUTION CONTROL****CHAPTER 70-244****COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 450**

An Act relating to pollutants; providing definitions; prohibiting such pollution; providing for authority in the department of natural resources to act in preventing and controlling oil spills and other pollution; authorizing the department to provide employees and equipment in ports and other places; providing for recovery of cost in controlling and cleaning pollution; providing for licenses for terminal facilities, and for fees and exceptions; creating Florida coastal protection fund; providing for strict liability; providing for criminal and civil penalties; providing for the removal of derelict vessels by the state; providing for cooperation and coordination of all state agencies; authorizing the department of natural resources to require by rules and regulations that terminal facilities and vessels establish and maintain evidence of financial responsibility to reimburse the state and private citizens for damages caused by discharges of pollutants; providing an appropriation; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Short title

This act shall be known as "the oil spill prevention and pollution control act."

Section 2. Legislative Intent

(1) The legislature finds and declares that the highest and best use of the seacoast of the state is as a source of public and private recreation.

(2) The legislature further finds and declares that the preservation of this use is a matter of the highest urgency and priority and that such use can only be served effectively by maintaining the coastal waters, estuaries, tidal flats, beaches and public lands adjoining the seacoast in as close to a pristine condition as possible, taking into account multiple use accommodations necessary to provide the broadest possible promotion of public and private interests.

(3) The legislature further finds and declares that the transfer of pollutants between vessels, between onshore facilities and vessels and between offshore facilities and vessels within the jurisdiction of the state and state waters is a hazardous undertaking; that spills, discharges and escape of pollutants occurring as a result of procedures involved in the transfer, storage, and transportation of such products pose threats of great danger and damage to the environment of the state; to owners and users of shorefront property; to public and private recreation; to citizens of the state and other interests deriving livelihood from marine related activities; and to the beauty of the Florida coast; that such hazards have frequently occurred in the past, are occurring now and present future threats of potentially catastrophic proportions, all of which are expressly declared to be inimical to the paramount interests of the state as herein set forth and that such state interests outweigh any economic burdens imposed by the legislature upon those engaged in transferring pollutants and related activities.

(4) The legislature intends by the enactment of this legislation to exercise the police power of the state through the department of natural resources by conferring upon said department power to deal with the hazards and threats of danger and damage posed by such transfers and related activities; to require the prompt containment and removal of pollution occasioned thereby; and to establish a fund to provide for the inspection and supervision of such

SECOND REGULAR SESSION Ch. 70-244

activities and guarantee the prompt payment of reasonable damage claims resulting therefrom.

(5) The legislature further finds and declares that the preservation of the public uses referred to herein is of grave public interest and concern to the state in promoting its general welfare, preventing diseases, promoting health and providing for the public safety, and that the state's interest in such preservation outweighs any burdens of absolute liability imposed by the legislature upon those engaged in transferring pollutants and related activities.

(6) The legislature further declares that it is the intent of this act to support and complement applicable provisions of the federal water quality improvement act of 1970,¹ specifically those provisions relating to the national contingency plan for removal of oil and other pollutants.

¹ 33 U.S.C.A. § 1151 et seq.

Section 3. Definitions

When used in this act, unless the context clearly requires otherwise:

(1) "Department" means the department of natural resources.

(2) "Director" means the executive director of the department of natural resources.

(3) "Barrel" means forty-two (42) U. S. gallons at sixty degrees (60°) Fahrenheit.

(4) "Other measurements" means measurements set by the department for products transferred at terminals which are other than fluid or which are not commonly measured by the barrel.

(5) "Discharge" means any spilling, leaking, seeping, pouring, emitting, emptying, or dumping.

(6) "Fund" means the Florida coastal protection fund.

(7) "Pollutants" shall include but not be limited to oil of any kind and in any form, gasoline, pesticides, ammonia, chlorine, and other hazardous materials.

(8) "Pollution" means the presence in the outdoor atmosphere or waters of the state of any one (1) or more substances or pollutants in quantities which are or may be potentially harmful or injurious to human health or welfare, animal or plant life, or property, or which may unreasonably interfere with the enjoyment of life or property, including outdoor recreation.

(9) "Terminal facility" means any waterfront facility of any kind, other than vessels not owned or operated by such facility, and related appurtenances located on land, including submerged lands, or on or under the surface of any kind of water, which facility and related appurtenances are used or capable of being used for the purpose of drilling for, pumping, storing, handling, transferring, processing, or refining oil or other pollutants, including, but not limited to, any such facility and related appurtenances owned or operated by a public utility, or a governmental or quasi-governmental body. A vessel shall be considered a terminal facility only in the event of a ship to ship transfer of oil, petroleum products, their by-products, and other pollutants, and only that vessel going to or coming from the place of transfer and the terminal facility.

(10) "Owner or operator" means any person owning or operating a terminal facility whether by lease, contract, or any other form of agreement.

(11) "Transferred" includes both onloading and offloading between terminal and vessel and vessel to vessel.

(12) "Vessel" includes every description of watercraft or other contrivance used, or capable of being used, as a means of transportation on water, whether self-propelled or otherwise, and includes barges and tugs.

(13) "Port manager" means the manager or director of the port or his designee, to be approved by the department, to carry out the requirements of this act.

Ch. 70-244 SECOND REGULAR SESSION

(14) "Person in charge" means the person on the scene who is in direct, responsible charge of a terminal facility or vessel from which oil or other pollutants are discharged when the discharge occurs.

(15) "Discharge cleanup organization" means any group, incorporated or unincorporated, of owners or operators of waterfront terminal facilities in any port or harbor of the state, and any other person who may elect to join, organized for the purpose of containing and cleaning up discharges of oil and other pollutants through cooperative efforts and shared equipment and facilities.

Section 4. Pollution and corruption of waters and lands of the state prohibited

The discharge of oil, petroleum products, their by-products, and other pollutants into or upon any coastal waters, estuaries, tidal flats, beaches, and lands adjoining the seacoast of the state is prohibited.

Section 5. Powers and duties of the department

(1) The powers and duties conferred by this act shall be exercised by the department of natural resources and shall be deemed to be an essential governmental function in the exercise of the police power of the state. The department of air and water pollution control is directed to cooperate with the department of natural resources and to offer consultative services, enforcement, prosecution, and technical advice to the department. The department may call upon any other state agency for consultative services and technical advice and the said agencies are directed to cooperate in said request.

(2) The powers and duties of the department under this act shall extend to the boundaries of the state described in article 11, section 1 of the constitution of Florida.

(3) Licenses required under this act shall be issued from the department subject to such terms and conditions as are set forth in this act and as set forth in rules and regulations promulgated by the department as authorized herein.

(4) Whenever it becomes necessary for the state to protect the public interest under this act, it shall be the duty of the department of natural resources to keep an accurate record of costs and expenses incurred and thereafter diligently to pursue the recovery of any sums so incurred from the government of the United States under any applicable federal act.

Section 6. Operation without license prohibited

(1) No person shall operate or cause to be operated a terminal facility as defined in this act without a license.

(2) Licenses shall be issued on an annual basis and shall expire on December 31 annually, subject to such terms and conditions as the department may determine are necessary to carry out the purposes of this act.

(3) As a condition precedent to the issuance or renewal of a license the department shall require satisfactory evidence that the applicant has implemented or is in the process of implementing state and federal plans and regulations for control of pollution related to oil, petroleum products, their by-products and other pollutants and the abatement thereof when a discharge occurs.

(4) Licenses issued to any terminal facility shall include vessels used to transport oil, petroleum products, their by-products, and other pollutants between the facility and vessels within state waters.

(5) The director may require, in connection with the issuance of a terminal facility license, the payment of a reasonable fee for processing applications for registration certificates. Such fee shall be reasonably related to the administrative costs of verifying data submitted pursuant to obtaining such certificates and reasonable inspections; provided, however, such fee shall not exceed \$250.00 per terminal facility per year.

SECOND REGULAR SESSION Ch. 70-244

(6) Within three (3) months of the effective date of this act every owner or operator of a terminal facility shall obtain a license. The department shall issue a license upon the showing that the said registrant can provide all necessary equipment to prevent, contain and remove discharges of oil and other pollutants.

(7) On or after a date to be determined by the director, but in no case later than ninety (90) days after the effective date of this act, no person shall operate or cause to be operated any terminal facility without a terminal facility registration certificate issued by the director. No registration certificate shall be valid for more than one (1) year unless revalidated by the director. Each applicant for a terminal facility registration certificate shall pay the annual license fee and shall submit information, in a form satisfactory to the director, describing the following:

- (a) The barrel or other measurement capacity of such terminal facility.
- (b) All containment and removal equipment, including, but not limited to, vehicles, vessels, pumps, skimmers, booms, chemicals, and communication devices, to which such facility has access, whether through direct ownership, by contract, or by membership in an approved discharge cleanup organization.
- (c) The terms of agreement and operation plan of any such discharge cleanup organization to which the owner or operator of such terminal facility belongs.

(8) Upon showing of satisfactory containment and cleanup capability under this section, and upon payment of any registration fee required by the director under this act and the license fee the applicant shall be issued a registration certificate covering such terminal facility and related appurtenances, including vessels as defined in this act.

Section 7. Regulatory powers of department

The department shall from time to time adopt, amend, repeal, and enforce reasonable regulations insofar as they relate to oil spills or discharges or the spills or discharges of other pollutants into the waters of this state, or onto the coasts of this state.

(1) Such regulations shall be adopted in accordance with the administrative procedure act, chapter 120, Florida Statutes.

(2) The department shall adopt regulations including but not limited to the following matters:

(a) Operating and inspection requirement for facilities, vessels, personnel and other matters relating to licensee operations under this act and specifically requiring that vessels transporting pollutants within state waters shall maintain on board such containment gear as may be required by the department with a crew trained in the use of such gear.

(b) Procedures and methods of reporting discharges and other occurrences prohibited by this act. Specifically, the pilot and the master of a vessel causing a discharge shall be required to immediately report the discharge to the port manager and to the nearest coast guard station. The port manager, on being notified of a discharge, shall immediately notify the response team of the department and the coast guard and shall keep them fully informed of the need for containment equipment and emergency action.

(c) The port manager shall have the authority to board any vessel prior to its entry into port in order to ascertain the seaworthiness of the vessel and the presence of required containment gear. Upon being notified of a discharge the port manager shall have authority to direct the vessel to immediately anchor or move to a specific dock and deploy containment gear or to move to the open seas and to take such other measures as he deems necessary. The port manager shall have the additional duty to inspect any terminal facility in his port to determine that adequate containment gear is on hand at the terminal facility.

Ch. 70-244 SECOND REGULAR SESSION

(d) Procedures, methods, means, and equipment to be used by persons subject to regulation by this act and to be used in the removal of pollutants.

(e) Development and implementation of criteria and plans to meet oil, petroleum, and other pollution occurrences of various degrees and kinds.

(f) The establishment of eleven (11) regional control districts, one for each of the eleven (11) deep water ports of the state, with a response team in each district and the establishment of rules and regulations to meet the particular requirements of each such district. The department shall create a state response team which shall be responsible for creating and maintaining a contingency plan of response, organization, and equipment for handling emergency cleanup operations. The state plans shall include detailed emergency operating procedures for the state as a whole and for the eleven (11) regional control districts, and the team shall from time to time conduct practice alerts. These plans shall be filed with the governor, all coast guard stations in the state and with the head of each regional team. The contingency plan shall include all necessary information for the total containment and cleanup of pollution, including but not limited to an inventory of equipment and its location, a table of organization with the names, addresses, and telephone numbers of all persons responsible for implementing every phase of the plan, a list of available sources of supplies necessary for cleanup and a designation of priority zones within each region to determine the sequence and methods of cleanup. The state response team shall act independently of agencies of the federal government but is directed to cooperate with any federal cleanup operation.

(g) Requirements for minimum weather and sea conditions for permitting a vessel to enter port and for the safety and operation of vessels, barges, tugs, motor vehicles, motorized equipment, and other equipment relating to the use and operation of terminals, facilities, and refineries, the approach and departure from terminals, facilities, and refineries, and shall require that containment gear approved by the department be on hand and maintained by terminal facilities, and refineries with adequate personnel trained in its use.

(h) Requirements that, prior to being granted entry into any port in this state, the master of a vessel shall report:

1. Any discharges of oil or other pollutants the vessel has had since leaving the last port.
2. Any mechanical problem on the vessel which creates the possibility of a spill.
3. Any denial of entry into any port during the current cruise of the vessel.

(i) A port manager who refuses entry of any vessel into the port under his charge shall be required to notify all other ports in the state of his refusal of entry of that vessel.

(j) Such other rules and regulations as the exigencies of any condition may require or such as may reasonably be necessary to carry out the intent of this act.

Section 8. Removal of prohibited discharges

(1) Any person discharging pollutants as prohibited by section 4 shall immediately undertake to remove such discharge to the department's satisfaction. Notwithstanding the above requirement the department may undertake the removal of such discharge and may contract and retain agents who shall operate under the direction of the department.

(2) Whenever oil or any other pollutant is discharged from any terminal facility or vessel in violation of section 4 of this act, the person in charge of such terminal facility or vessel shall promptly remove, or arrange for the removal of, such oil or other pollutant. If the person in charge fails so to act, the director may arrange for the removal of such pollutant; provided that, if such oil or other pollutant was discharged into or upon the navigable

SECOND REGULAR SESSION Ch. 70-244

waters of the United States, the director shall act in accordance with the national contingency plan for removal of oil or other pollutant established pursuant to the federal water quality improvement act of 1970 and the costs of removal incurred by the director shall be paid in accordance with the applicable provisions of said law.

(3) In the event of discharge, the source of which is unknown, any local discharge cleanup organization shall, upon the request of the director or his designee, immediately contain and remove such discharge. No action taken by any person to contain or remove a discharge, whether such action is taken voluntarily or at the request of the director or his designee, shall be construed as an admission of liability for such discharge.

(4) No person who voluntarily, or at the request of the director or his designee, renders assistance in containing or removing oil or other pollutants shall be liable for any civil damages to third parties resulting solely from acts or omissions of such person in rendering such assistance, except for acts or omissions amounting to gross negligence or willful misconduct.

(5) Nothing in this act shall affect in any way the right of any person who renders assistance in containing or removing oil or other pollutants to reimbursement for the costs of such containment or removal under the applicable provisions of the federal water quality improvement act of 1970¹ or any rights which said person may have against any third party whose acts or omissions in any way have caused or contributed to the discharge of such oil or other pollutants.

¹ 33 U.S.C.A. § 1151 et seq.

Section 9. Personnel and equipment

The department shall establish and maintain at such ports within the state, and other places as it shall determine, such employees and equipment, other than such equipment furnished by the licensee, as in its judgment may be necessary to carry out the provisions of this act. The department may employ and prescribe the duties of such employees, subject to the rules and regulations of the division of personnel and retirement of the department of administration. The salaries of such employees and the cost of such equipment shall be paid from the Florida coastal protection fund established by this act. The department shall periodically consult with other departments of the state and specifically with the department of air and water pollution control relative to procedures for the prevention of discharges of oil and other pollutants into the coastal waters of the state from off-shore drilling production facilities.

Section 10. Enforcement, penalties

Whoever violates any provisions of this act or any rule, regulation, or order of the department made hereunder shall be punished by a civil penalty of not more than fifty thousand dollars (\$50,000) to be assessed by the department. Each day that any violation continues constitutes a separate offense. The provisions of this section shall not apply to any discharge immediately reported and completely removed by a licensee in accordance with the regulations and orders of the department.

Section 11. Florida coastal protection fund

(1) The Florida coastal protection fund is established to be used by the department as a non-lapsing revolving fund for carrying out the purposes of this act. The fund shall be limited to the sum of five million dollars (\$5,000,000). To this fund shall be credited all license fees, penalties, and other fees and charges related to this act, including administrative expenses, and costs of removal of discharges of pollution.

(2) Moneys in the fund not needed currently to meet the obligations of the department in the exercise of its responsibilities under this act shall be deposited with the treasurer to the credit of the fund, and may be invested in such manner as is provided for by statute. Interest received on such investment shall be credited to the Florida coastal protection fund.

Ch. 70-244 SECOND REGULAR SESSION

(3) Each registrant shall obtain from the department a license for each of the terminal facilities of the registrant in the state and shall pay therefor an annual license fee, the amount of which is to be determined by the department upon the basis of the total capacity of the terminal facility for oil and other pollutants, but in no event shall exceed five hundred dollars (\$500.00). License fees for a part of a year shall be prorated.

(4) Whenever the balance in the fund has reached the limit provided under this act, and as long as it remains so, license fees shall be proportionately reduced to cover only administrative expenses.

(5) Moneys in the Florida coastal protection fund shall be disbursed for the following purposes and no others:

(a) Administrative expenses, personnel expenses and equipment costs of the department related to the enforcement of this act.

(b) All costs involved in the abatement of pollution related to the discharge of oil, petroleum products, their by-products and other pollutants covered by this act and the abatement of other potential pollution hazards as authorized herein.

(c) All costs and expenses of the cleanup and rehabilitation of water fowl and other wildlife, whether performed by the department or any other state or local agency.

(6) The department shall recover to the use of the fund from the person or persons causing the discharge jointly and severally all sums expended therefrom, including overdrafts, for the following purposes; provided that recoveries resulting from damage due to an oil pollution or other similar disaster shall be apportioned between the Florida coastal protection fund and the general revenue fund so as to repay the full costs to the general revenue fund of any sums disbursed therefrom as a result of such disaster:

(a) All costs and expenses expended under paragraphs (b) and (c) of subsection (5) of this act.

(b) Requests for reimbursement to the fund for the above costs if not paid within thirty (30) days of demand shall be turned over to the department of air and water pollution control which, in cooperation with the attorney general, shall undertake the collection.

(c) Upon petition of the person determined to be liable for reimbursement to the fund for abatement costs under subsection (6) the department may, after hearing, waive the right to reimbursement to the fund from such person if the department finds that the occurrence was the result of any of the following:

1. An act of war.

2. An act of government, either state, federal, or municipal.

3. An act of God, which means an unforeseeable act exclusively occasioned by the violence of nature without the interference of any human agency.

4. An act or omission of a third party without regard to whether any such act or omission was or was not negligent.

The findings of the department shall be conclusive as it is the legislative intent that waiver provided in this act is a privilege conferred, not a right granted.

Section 12. Liabilities of licensees

Because it is the intent of this act to provide the means for rapid and effective cleanup and to minimize damages, any licensee and its agents or servants including vessels destined for or leaving a licensee's terminal facility who permits or suffers a prohibited discharge or other polluting condition to take place within state boundaries shall be liable to the state for all costs of cleanup or other damage incurred by the state and for damages resulting from injury to others. In any suit to enforce claims of the state under this

SECOND REGULAR SESSION Ch. 70-244

act, it shall not be necessary for the state to plead or prove negligence in any form or manner on the part of the licensee or any vessel. If the state is damaged by a discharge prohibited by this act it need only plead and prove the fact of the prohibited discharge or other polluting condition and that it occurred. In addition to the civil penalty, the pilot and the master of any vessel or person in charge of any licensee's terminal facility who fail to give immediate notification of a discharge to the port manager and the nearest coast guard station shall be guilty of a felony and shall, upon conviction, be punished by imprisonment for not more than two (2) years or by a fine of not more than ten thousand dollars (\$10,000). The department shall, by rules and regulations, require that the licensee designate a person at the terminal facility who shall be the person in charge of that facility for the purposes specified by this section.

Section 13. Emergency proclamation; governor's powers

(1) Whenever any disaster or catastrophe exists or appears imminent arising from the discharge of oil, petroleum products or their by-products, or any other pollutants, the governor shall by proclamation declare the fact and that an emergency exists in any or all sections of the state. If the governor is unavailable, the lieutenant governor shall, by proclamation, declare the fact and that an emergency exists in any or all sections of the state. A copy of such proclamation shall be filed with the secretary of state.

(2) In performing his duties under this act, the governor is authorized and directed to cooperate with all departments and agencies of the federal government, with the offices and agencies of other states and foreign countries, and the political subdivisions thereof, and with private agencies in all matters pertaining to a disaster or catastrophe.

(3) In performing his duties under this act, the governor is further authorized and empowered:

(a) To make, amend and rescind the necessary orders, rules and regulations to carry out this act within the limits of the authority conferred upon him and not inconsistent with the rules, regulations and directives of the President of the United States or of any federal department or agency having specifically authorized emergency functions.

(b) To delegate any authority vested in him under this act, and to provide for the subdelegation of any such authority.

(4) Whenever the governor is satisfied that an emergency no longer exists, he may terminate the proclamation by another proclamation affecting the sections of the state covered by the original proclamation, or any part thereof. Said proclamation shall be published in such newspapers of the state and posted in such places as the governor, or the person acting in that capacity, deems appropriate.

Section 14. Terminal facilities and vessels required to file bond

(1) Each owner or operator of a terminal facility or vessel, including any barge, using any port in Florida shall establish and maintain, under rules and regulations prescribed by the department of natural resources, evidence of financial responsibility based on the capacity of the terminal facility or tonnage of the ship, the cargo carried, and other similar factors to which the vessel could be subjected under this act. Financial responsibility may be established and maintained by any one (1) of, or a combination of the following methods acceptable to the department:

(a) Evidence of insurance,

(b) Surety bonds payable to the governor of the state conditioned to pay all costs and expenses of the cleanup of any discharge as well as damages caused to the state and any other person,

(c) Qualification as a self-insurer, or

(d) Other evidence of financial responsibility satisfactory to the department.

Ch. 70-244 SECOND REGULAR SESSION

(2) If a bond is filed with the department, then such bond shall be issued by a bonding company authorized to do business in the state.

(3) Any claim for costs incurred by such terminal facility or vessel may be brought directly against the insurer or any other person providing evidence of financial responsibility. Any claim for costs of cleanup, civil penalties or damages by the state and any claim for damages by any injured person may be brought directly against the bond, the insurer, or against any other person providing evidence of financial responsibility.

(4) Each owner or operator of a terminal facility or a vessel subject to the provisions of this act shall designate a person in the state as his legal agent for service of process under this act and such designation shall be filed with the secretary of state. In the absence of such designation the secretary of state shall be the designated agent for purposes of service of process under this act.

Section 15. Derelict vessels

(1) It is unlawful for any person, firm or corporation to store or leave any vessel in a wrecked, junked or substantially dismantled condition or abandoned upon any public waters or at any port in this state without the consent of the agency having jurisdiction thereof, or docked at any private property without the consent of the owner of such private property.

(2) The department is hereby designated as the agency of the state authorized and empowered to remove any derelict vessel from public waters in any instance when the same obstructs or threatens to obstruct navigation or contributes to air or water pollution or in any other way constitutes a danger or potential danger to the environment. This section shall constitute the authority of the department for such removal, but is not intended to be in contravention of any applicable federal act. The attorney general shall be the representative of the department of natural resources in such actions.

Section 16. Enforcement and penalties

It shall be unlawful for any person to violate any provision of this act or any rule, regulation or order of the department made hereunder. Violation shall be punishable by a civil penalty up to fifty thousand dollars (\$50,000) to be assessed by the department. Each day during any portion of which such violation occurs constitutes a separate offense. Penalties assessed herein for a discharge shall be the only penalties assessed by the state and the assessed person or persons shall be excused from paying any additional penalty for water pollution assessable under chapter 403, Florida Statutes, for the same occurrence. The penalty provisions of this act shall not apply to any discharge promptly reported and removed by a licensee in accordance with the rules, regulations and orders of the department.

Section 17. Reports to the legislature

The department shall include in its recommendations to each legislature specific recommendations relating to the operation of this act, specifically including a license fee formula to reflect individual licensee experience, and a fee schedule based upon volatility and toxicity of petroleum products, their by-products and other pollutants.

Section 18. Budget approval

The department shall submit to each legislature its budget recommendations for disbursements from the fund. Upon approval thereof, the comptroller shall authorize expenditures therefrom as approved by the department.

Section 19. County and municipal ordinances; powers limited

Nothing in this act shall be construed to deny any county or municipality by ordinance or by law from exercising police powers under any general or special act, and laws and ordinances promulgated in furtherance of the intent of this act to promote the general welfare, public health, and public safety shall be valid unless in direct conflict with the provisions of this act or any

SECOND REGULAR SESSION Ch. 70-244

rule, regulations, or order of the department adopted under authority of this act; provided, however, that in order to avoid unnecessary duplication, no county, municipality, or other political subdivision of the state may adopt or establish a similar program of licensing and fees for the accomplishment of the purposes of this act.

Section 20.

Nothing in this act shall be deemed to apply to the storage or transportation of liquefied petroleum gas or atmosphere of the state to industrial effluents discharged into the waters and water pollution contrapursuant to a permit issued by department of air

Section 21. Construction

This act, being necessary for the general welfare, the public health, and the effect the purposes set forth in its inhabitants, shall be liberally construed to promote the purposes of the act of 1970.¹ under this act and the federal water quality improvement act of 1970, 133 U.S.C.A. § 1151 et seq.

Section 22.

There is hereby appropriated from the general revenue fund one hundred thousand dollars (\$100,000) to be transferred and deposited in the trust fund created in section 11 of this act. When the trust fund exceeds one million dollars (\$1,000,000), then the sum transferred originally from the general revenue fund shall be returned to the general revenue fund.

Section 23.

The provisions of this act are severable, and it is the intention to confer powers provided herein, and if any of the provisions of this act shall be held unconstitutional by any court of competent jurisdiction, the decision of such court shall not affect or impair any of the remaining provisions.

Section 24. This act shall

Approved by the Governor take effect July 1, 1970.

Filed in Office Secretary June 30, 1970.

of State June 30, 1970.

STATE OF FLORIDA
DEPARTMENT OF NATURAL RESOURCES
Division of Marine Resources

CHAPTER 16B-16.08

Chapter 70-244 - Oil Spill Bill
Financial Responsibility - Vessels

16B-16.08

- (1) No vessel or barge, carrying oil of any kind and in any form, gasoline, pesticides, ammonia, chlorine, or other hazardous materials as cargo, shall use any port in Florida on or after March 1, 1961, for any purpose unless a certificate of financial responsibility has been issued by the Department covering such vessel or barge.
- (2) Either owners or operators of vessels or barges subject to Chapter 70-244, Laws of Florida, must establish and maintain with the Department evidence of financial responsibility in an amount not to exceed \$100 per gross ton of such vessel or \$5,000,000 whichever is lesser. Provided, however, that if an applicant is the owner of more than one vessel or barge subject to this rule, financial responsibility to which the largest vessel or barge could be subjected hereunder. Nothing herein shall be construed to prohibit

third parties from establishing evidence of financial responsibility for such owners or operators of vessels or barges.

- (3) The financial responsibility herein required may be established and maintained by any one (1) of, or a combination of, the following methods acceptable to the Department:

(a) Evidence of insurance - conditioned to pay all costs and expenses of the cleanup of a any discharge as well as damages caused to the state and any other person.

(b) Surety bonds payable to the governor of the State conditioned to pay all costs and expenses of the cleanup of any discharge as well as damages caused to the state and any other person.

(c) Qualification as a self-insurer, or

(d) Other evidence of financial responsibility satisfactory to the Department.

- (4) All applications, evidence, documents, and other statements required to be filed with the Department shall be in English, and any monetary terms shall be

expressed in terms of United States currency. Such evidence of financial responsibility shall be on forms furnished by the Department upon request of the applicant.

- (5) Where evidence of financial responsibility has been established, a separate certificate covering each vessel shall be issued evidencing the Department's finding of adequate financial responsibility to meet the minimum requirements of this rule.

General Authority

Chapter 70-244(7)
General Laws of Florida

Law Implemented

Chapter 70-244(14)
General Laws of Florida

33 § 1160

NAVIGABLE WATERS

Ch. 23

No. 2, set out as a note under section 1151 of this title.

Functions of Secretary of Health, Education, and Welfare under subsections (c) (4) and (f) of this section were transferred to Secretary of the Interior by section 1(d) (2) of 1966 Reorg. Plan No. 2, set out as a note under section 1151 of this title.


Selection of Members of Hearing Boards. Secretary of the Interior to give the Secretary of Health, Education, and Welfare opportunity to select a member of each Hearing Board appointed pursuant to subsections (c) (4) and (f) of this section as modified by 1966 Reorg. Plan No. 2, see section 1(d) (3) of 1966 Reorg. Plan No. 2, set out as a note under section 1151 of this title.

Actions by Surgeon General Relating to Interstate Pollution. Section 5 of Act July 9, 1956, provided that: "In the case of any discharge or discharges causing or contributing to water pollution with respect to which the actions by the Surgeon General

prescribed under paragraph (2) of section 2(d) of the Water Pollution Control Act [section 1153(d) (2) of this title], as in effect prior to the enactment of this Act [July 9, 1956], have already been completed prior to such enactment, the provisions of such section shall continue to be applicable; except that nothing in this section shall prevent action with respect to any such pollution under and in accordance with the provisions of the Water Pollution Control Act [this chapter], as amended by this Act [Act July 9, 1956]."

Legislative History. For legislative history and purpose of Act June 30, 1948, see 1949 U.S. Code Cong. Service, p. 2215. See, also, Act July 17, 1952, 1952 U.S. Code Cong. and Adm. News, p. 2312; Act July 9, 1956, 1956 U.S. Code Cong. and Adm. News, p. 3023; Pub. L. 87-83, 1961 U.S. Code Cong. and Adm. News, p. 2076; Pub. L. 89-234, 1965 U.S. Code Cong. and Adm. News, p. 3313; Pub. L. 89-753, 1966 U.S. Code Cong. and Adm. News, p. 3009; Pub. L. 91-224, 1970 U.S. Code Cong. and Adm. News, p. —.

Library References

Navigable Waters  33.

C.J.S. Navigable Waters § 11.

§ 1161. Control of pollution by oil—Definitions

(a) For the purpose of this section, the term—

(1) "oil" means oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil;

(2) "discharge" includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying or dumping;

(3) "vessel" means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water other than a public vessel;

(4) "public vessel" means a vessel owned or bare-boat chartered and operated by the United States, or by a State or political subdivision thereof, or by a foreign nation, except when such vessel is engaged in commerce;

(5) "United States" means the States, the District of Columbia, the Commonwealth of Puerto Rico, the Canal Zone, Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands;

(6) "owner or operator" means (A) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, and (B) in the case of an onshore facility, and an offshore facility, any person owning or operating such onshore fa-

cility or offshore facility, and (C) in the case of any abandoned offshore facility, the person who owned or operated such facility immediately prior to such abandonment;

(7) "person" includes an individual, firm, corporation, association, and a partnership.

(8) "remove" or "removal" refers to removal of the oil from the water and shorelines or the taking of such other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches;

(9) "contiguous zone" means the entire zone established or to be established by the United States under article 24 of the Convention on the Territorial Sea and the Contiguous Zone;

(10) "onshore facility" means any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land within the United States other than submerged land;

(11) "offshore facility" means any facility of any kind located in, on, or under, any of the navigable waters of the United States other than a vessel or a public vessel;

(12) "act of God" means an act occasioned by an unanticipated grave natural disaster;

(13) "barrel" means 42 United States gallons at 60 degrees Fahrenheit.

Congressional declaration of policy; prohibition against discharge of oil; exceptions; rules and regulations; determination of harmful quantities of discharged oil; notification of United States of discharge of oil; penalties for failure to notify; procedure for imposition of civil penalties for knowingly discharging oil; withholding of clearance

(b) (1) The Congress hereby declares that it is the policy of the United States that there should be no discharges of oil into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone.

(2) The discharge of oil into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone in harmful quantities as determined by the President under paragraph (3) of this subsection, is prohibited, except (A) in the case of such discharges into the waters of the contiguous zone, where permitted under article IV of the International Convention for the Prevention of Pollution of the Sea by Oil, 1954, as amended, and (B) where permitted in quantities and at times and locations or under such circumstances or conditions as the President may, by regulation, determine not to be harmful. Any regulations issued under this subsection shall be consistent with maritime safety and with marine and navigation laws and regulations and applicable water quality standards.

(3) The President shall, by regulation, to be issued as soon as possible after April 3, 1970, determine for the purposes of this section, those quantities of oil the discharge of which, at such times, locations, circumstances, and conditions, will be harmful to the public health or welfare of the United States, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches, except that in the case of the discharge of oil into or upon the waters of the contiguous zone, only those discharges which threaten the fishery resources of the contiguous zone or threaten to pollute or contribute to the pollution of the territory or the territorial sea of the United States may be determined to be harmful.

(4) Any person in charge of a vessel or of an onshore facility or an offshore facility shall, as soon as he has knowledge of any discharge of oil from such vessel or facility in violation of paragraph (2) of this subsection, immediately notify the appropriate agency of the United States Government of such discharge. Any such person who fails to notify immediately such agency of such discharge shall, upon conviction, be fined not more than \$10,000, or imprisoned for not more than one year, or both. Notification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement.

(5) Any owner or operator of any vessel, onshore facility, or offshore facility from which oil is knowingly discharged in violation of paragraph (2) of this subsection shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than \$10,000 for each offense. No penalty shall be assessed unless the owner or operator charged shall have been given notice and opportunity for a hearing on such charge. Each violation is a separate offense. Any such civil penalty may be compromised by such Secretary. In determining the amount of the penalty, or the amount agreed upon in compromise, the appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation, shall be considered by such Secretary. The Secretary of the Treasury shall withhold at the request of such Secretary the clearance required by section 91 of Title 46, of any vessel the owner or operator of which is subject to the foregoing penalty. Clearance may be granted in such cases upon the filing of a bond or other surety satisfactory to such Secretary.

**National Contingency Plan for removal of discharged oil;
provisions; revisions; compliance**

(c) (1) Whenever any oil is discharged, into or upon the navigable waters of the United States, adjoining shorelines, or into or

upon the waters of the contiguous zone, the President is authorized to act to remove or arrange for the removal of such oil at any time, unless he determines such removal will be done properly by the owner or operator of the vessel, onshore facility, or offshore facility from which the discharge occurs.

(2) Within sixty days after April 3, 1970, the President shall prepare and publish a National Contingency Plan for removal of oil pursuant to this subsection. Such National Contingency Plan shall provide for efficient, coordinated, and effective action to minimize damage from oil discharges, including containment, dispersal, and removal of oil, and shall include, but not be limited to—

(A) assignment of duties and responsibilities among Federal departments and agencies in coordination with State and local agencies, including, but not limited to, water pollution control, conservation, and port authorities;

(B) identification, procurement, maintenance, and storage of equipment and supplies;

(C) establishment or designation of a strike force consisting of personnel who shall be trained, prepared, and available to provide necessary services to carry out the Plan, including the establishment at major ports, to be determined by the President, of emergency task forces of trained personnel, adequate oil pollution control equipment and material, and a detailed oil pollution prevention and removal plan;

(D) a system of surveillance and notice designed to insure earliest possible notice of discharges of oil to the appropriate Federal agency;

(E) establishment of a national center to provide coordination and direction for operations in carrying out the Plan;

(F) procedures and techniques to be employed in identifying, containing, dispersing, and removing oil; and

(G) a schedule, prepared in cooperation with the States, identifying (i) dispersants and other chemicals, if any, that may be used in carrying out the Plan, (ii) the waters in which such dispersants and chemicals may be used, and (iii) the quantities of such dispersant or chemical which can be used safely in such waters, which schedule shall provide in the case of any dispersant, chemical, or waters not specifically identified in such schedule that the President, or his delegate, may, on a case-by-case basis, identify the dispersants and other chemicals which may be used, the waters in which they may be used, and the quantities which can be used safely in such waters.

The President may, from time to time, as he deems advisable, revise or otherwise amend the National Contingency Plan. After publication of the National Contingency Plan, the removal of oil and actions to minimize damage from oil discharges shall, to the greatest

extent possible, be in accordance with the National Contingency Plan

Marine disasters; creation of a substantial threat of a pollution hazard; removal or elimination of pollution hazard; removal or destruction of vessel; employment of personnel; expenses

(d) Whenever a marine disaster in or upon the navigable waters of the United States has created a substantial threat of a pollution hazard to the public health or welfare of the United States, including, but not limited to, fish, shellfish, and wildlife and the public and private shorelines and beaches of the United States, because of a discharge, or an imminent discharge, of large quantities of oil from a vessel the United States may (A) coordinate and direct all public and private efforts directed at the removal or elimination of such threat; and (B) summarily remove, and, if necessary, destroy such vessel by whatever means are available without regard to any provision of law governing the employment of personnel or the expenditure of appropriated funds. Any expense incurred under this subsection shall be a cost incurred by the United States Government for the purposes of subsection (f) of this section in the removal of oil.

Action by United States attorney to abate actual or threatened discharge of oil from an onshore or offshore facility; jurisdiction; nature of relief

(e) In addition to any other action taken by a State or local government, when the President determines there is an imminent and substantial threat to the public health or welfare of the United States, including, but not limited to, fish, shellfish, and wildlife and public and private property, shorelines, and beaches within the United States, because of an actual or threatened discharge of oil into or upon the navigable waters of the United States from an onshore or offshore facility, the President may require the United States attorney of the district in which the threat occurs to secure such relief as may be necessary to abate such threat, and the district courts of the United States shall have jurisdiction to grant such relief as the public interest and the equities of the case may require.

Liability of owner or operator of vessel, onshore facility, or offshore facility for discharge of oil; exceptions; amount of liability; procedure for recovery

(f) (1) Except where an owner or operator can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any vessel from which oil is discharged in violation of subsection (b) (2) of this section shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil by the United States Government in an amount not to exceed \$100 per

gross ton of such vessel or \$14,000,000, whichever is lesser, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. Such costs shall constitute a maritime lien on such vessel which may be recovered in an action in rem in the district court of the United States for any district within which any vessel may be found. The United States may also bring an action against the owner or operator of such vessel in any court of competent jurisdiction to recover such costs.

(2) Except where an owner or operator of an onshore facility can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any such facility from which oil is discharged in violation of subsection (b) (2) of this section shall be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil by the United States Government in an amount not to exceed \$8,000,000, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. The United States may bring an action against the owner or operator of such facility in any court of competent jurisdiction to recover such costs. The Secretary is authorized, by regulation, after consultation with the Secretary of Commerce and the Small Business Administration, to establish reasonable and equitable classifications of those onshore facilities having a total fixed storage capacity of 1,000 barrels or less which he determines because of size, type, and location do not present a substantial risk of the discharge of oil in violation of subsection (b) (2) of this section, and apply with respect to such classifications differing limits of liability which may be less than the amount contained in this paragraph.

(3) Except where an owner or operator of an offshore facility can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any such facility from which oil is discharged in violation of subsection (b) (2) of this section shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the re-

removal of such oil by the United States Government in an amount not to exceed \$8,000,000, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. The United States may bring an action against the owner or operator of such a facility in any court of competent jurisdiction to recover such costs.

Proof by owner or operator of vessel, onshore facility, or offshore facility of liability of third party for discharge of oil; exceptions to third party liability; amount of liability; procedure for recovery

(g) In any case where an owner or operator of a vessel, of an onshore facility, or of an offshore facility, from which oil is discharged in violation of subsection (b) (2) of this section proves that such discharge of oil was caused solely by an act or omission of a third party, or was caused solely by such an act or omission in combination with an act of God, an act of war, or negligence on the part of the United States Government, such third party shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for removal of such oil by the United States Government, except where such third party can prove that such discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of another party without regard to whether such act or omission was or was not negligent, or any combination of the foregoing clauses. If such third party was the owner or operator of a vessel which caused the discharge of oil in violation of subsection (b) (2) of this section, the liability of such third party under this subsection shall not exceed \$100 per gross ton of such vessel or \$14,000,000, whichever is the lesser. In any other case the liability of such third party shall not exceed the limitation which would have been applicable to the owner or operator of the vessel or the onshore or offshore facility from which the discharge actually occurred, if such owner or operator were liable. If the United States can show that the discharge of oil in violation of subsection (b) (2) of this section was the result of willful negligence or willful misconduct within the privity and knowledge of such third party, such third party shall be liable to the United States Government for the full amount of such removal costs. The United States may bring an action against the third party in any court of competent jurisdiction to recover such removal costs.

Preservation of rights of owner or operator of vessel, onshore facility, or offshore facility, or United States against any third party

(h) The liabilities established by this section shall in no way affect any rights which (1) the owner or operator of a vessel or of an onshore facility or an offshore facility may have against any third party whose acts may in any way have caused or contributed to

gross ton of such vessel or \$14,000,000, whichever is lesser, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. Such costs shall constitute a maritime lien on such vessel which may be recovered in an action in rem in the district court of the United States for any district within which any vessel may be found. The United States may also bring an action against the owner or operator of such vessel in any court of competent jurisdiction to recover such costs.

(2) Except where an owner or operator of an onshore facility can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any such facility from which oil is discharged in violation of subsection (b) (2) of this section shall be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil by the United States Government in an amount not to exceed \$8,000,000, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. The United States may bring an action against the owner or operator of such facility in any court of competent jurisdiction to recover such costs. The Secretary is authorized, by regulation, after consultation with the Secretary of Commerce and the Small Business Administration, to establish reasonable and equitable classifications of those onshore facilities having a total fixed storage capacity of 1,000 barrels or less which he determines because of size, type, and location do not present a substantial risk of the discharge of oil in violation of subsection (b) (2) of this section, and apply with respect to such classifications differing limits of liability which may be less than the amount contained in this paragraph.

(3) Except where an owner or operator of an offshore facility can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any such facility from which oil is discharged in violation of subsection (b) (2) of this section shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the re-

removal of such oil by the United States Government in an amount not to exceed \$8,000,000, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. The United States may bring an action against the owner or operator of such a facility in any court of competent jurisdiction to recover such costs.

Proof by owner or operator of vessel, onshore facility, or offshore facility of liability of third party for discharge of oil; exceptions to third party liability; amount of liability; procedure for recovery

(g) In any case where an owner or operator of a vessel, of an onshore facility, or of an offshore facility, from which oil is discharged in violation of subsection (b) (2) of this section proves that such discharge of oil was caused solely by an act or omission of a third party, or was caused solely by such an act or omission in combination with an act of God, an act of war, or negligence on the part of the United States Government, such third party shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for removal of such oil by the United States Government, except where such third party can prove that such discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of another party without regard to whether such act or omission was or was not negligent, or any combination of the foregoing clauses. If such third party was the owner or operator of a vessel which caused the discharge of oil in violation of subsection (b) (2) of this section, the liability of such third party under this subsection shall not exceed \$100 per gross ton of such vessel or \$14,000,000, whichever is the lesser. In any other case the liability of such third party shall not exceed the limitation which would have been applicable to the owner or operator of the vessel or the onshore or offshore facility from which the discharge actually occurred, if such owner or operator were liable. If the United States can show that the discharge of oil in violation of subsection (b) (2) of this section was the result of willful negligence or willful misconduct within the privity and knowledge of such third party, such third party shall be liable to the United States Government for the full amount of such removal costs. The United States may bring an action against the third party in any court of competent jurisdiction to recover such removal costs.

Preservation of rights of owner or operator of vessel, onshore facility, or offshore facility, or United States against any third party

(h) The liabilities established by this section shall in no way affect any rights which (1) the owner or operator of a vessel or of an onshore facility or an offshore facility may have against any third party whose acts may in any way have caused or contributed to

such discharge, or (2) the United States Government may have against any third party whose actions may in any way have caused or contributed to the discharge of oil.

Removal by owner or operator of vessel, onshore facility, or offshore facility of discharged oil; suit against United States for recovery of reasonable cost of removal; applicability to Outer Continental Shelf Lands Act; payment of judgment

(i) (1) In any case where an owner or operator of a vessel or an onshore facility or an offshore facility from which oil is discharged in violation of subsection (b) (2) of this section acts to remove such oil in accordance with regulations promulgated pursuant to this section, such owner or operator shall be entitled to recover the reasonable costs incurred in such removal upon establishing, in a suit which may be brought against the United States Government in the United States Court of Claims, that such discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether such act or omission was or was not negligent, or of any combination of the foregoing clauses.

(2) The provisions of this subsection shall not apply in any case where liability is established pursuant to the Outer Continental Shelf Lands Act.

(3) Any amount paid in accordance with a judgment of the United States Court of Claims pursuant to this section shall be paid from the fund established pursuant to subsection (k) of this section.

Issuance of rules and regulations consistent with the National Contingency Plan; compliance; imposition of civil penalties for violations; amount

(j) (1) Consistent with the National Contingency Plan required by subsection (c) (2) of this section, as soon as practicable after April 3, 1970, and from time to time thereafter, the President shall issue regulations consistent with maritime safety and with marine and navigation laws (A) establishing methods and procedures for removal of discharged oil, (B) establishing criteria for the development and implementation of local and regional oil removal contingency plans, (C) establishing procedures, methods, and requirements for equipment to prevent discharges of oil from vessels and from onshore facilities and offshore facilities, and (D) governing the inspection of vessels carrying cargoes of oil and the inspection of such cargoes in order to reduce the likelihood of discharges of oil from such vessels in violation of this section.

(2) Any owner or operator of a vessel or an onshore facility or an offshore facility and any other person subject to any regulation issued under paragraph (1) of this subsection who fails or refuses to comply with the provisions of any such regulation, shall be liable to a civil penalty of not more than \$5,000 for each such violation. Each violation shall be a separate offense. The President may as-

sess and compromise such penalty. No penalty shall be assessed until the owner, operator, or other person charged shall have been given notice and an opportunity for a hearing on such charge. In determining the amount of the penalty, or the amount agreed upon in compromise, the gravity of the violation, and the demonstrated good faith of the owner, operator, or other person charged in attempting to achieve rapid compliance, after notification of a violation, shall be considered by the President.

Authorization of appropriations

(k) There is hereby authorized to be appropriated to a revolving fund to be established in the Treasury not to exceed \$35,000,000 to carry out the provisions of subsections (c), (i), and (l) of this section and section 1162 of this title. Any other funds received by the United States under this section shall also be deposited in said fund for such purposes. All sums appropriated to, or deposited in, said fund shall remain available until expended.

Administration of oil pollution control; delegation of authority by President; availability of appropriations; utilization of personnel, services, and facilities

(l) The President is authorized to delegate the administration of this section to the heads of those Federal departments, agencies, and instrumentalities which he determines to be appropriate. Any moneys in the fund established by subsection (k) of this section shall be available to such Federal departments, agencies, and instrumentalities to carry out the provisions of subsections (c) and (i) of this section and section 1162 of this title. Each such department, agency, and instrumentality, in order to avoid duplication of effort, shall, whenever appropriate, utilize the personnel, services, and facilities of other Federal departments, agencies, and instrumentalities.

Enforcement of provisions

(m) Anyone authorized by the President to enforce the provisions of this section may, except as to public vessels, (A) board and inspect any vessel upon the navigable waters of the United States or the waters of the contiguous zone, (B) with or without a warrant arrest any person who violates the provisions of this section or any regulation issued thereunder in his presence or view, and (C) execute any warrant or other process issued by an officer or court of competent jurisdiction.

Jurisdiction and venue

(n) The several district courts of the United States are invested with jurisdiction for any actions, other than actions pursuant to subsection (i) (1) of this section, arising under this section. In the case of Guam, such actions may be brought in the district court of Guam, and in the case of the Virgin Islands such actions may be brought in the district court of the Virgin Islands. In the case of

American Samoa and the Trust Territory of the Pacific Islands, such actions may be brought in the District Court of the United States for the District of Hawaii and such court shall have jurisdiction of such actions. In the case of the Canal Zone, such actions may be brought in the United States District Court for the District of the Canal Zone.

Existing liability for damages for oil discharge or removal not affected or modified; power of State or political subdivision thereof to impose requirements or liabilities for oil discharge not preempted; existing Federal, State, or local authority or law not affected or modified

(o) (1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency under any provision of law for damages to any publicly-owned or privately-owned property resulting from a discharge of any oil or from the removal of any such oil.

(2) Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil into any waters within such State.

(3) Nothing in this section shall be construed as affecting or modifying any other existing authority of any Federal department, agency, or instrumentality, relative to onshore or offshore facilities under this chapter or any other provision of law, or to affect any State or local law not in conflict with this section.

Financial responsibility of vessels; amount; establishment; effective date; administration of provisions; claim for costs against insurer; study and report on need for financial responsibility of vessels, and onshore and offshore facilities

(p) (1) Any vessel over three hundred gross tons, including any barge of equivalent size, using any port or place in the United States or the navigable waters of the United States for any purpose shall establish and maintain under regulations to be prescribed from time to time by the President, evidence of financial responsibility of \$100 per gross ton, or \$14,000,000 whichever is the lesser to meet the liability to the United States which such vessel could be subjected under this section. In cases where an owner or operator owns, operates, or charters more than one such vessel, financial responsibility need only be established to meet the maximum liability to which the largest of such vessels could be subjected. Financial responsibility may be established by any one of, or a combination of, the following methods acceptable to the President: (A) evidence of insurance, (B) surety bonds, (C) qualification as a self-insurer, or (D) other evidence of financial responsibility. Any bond filed shall be issued by a bonding company authorized to do business in the United States.

(2) The provisions of paragraph (1) of this subsection shall be effective one year after April 3, 1970. The President shall delegate

33 § 1161

NAVIGABLE WATERS

Ch. 23

the responsibility to carry out the provisions of this subsection to the appropriate agency head within sixty days after April 3, 1970. Regulations necessary to implement this subsection shall be issued within six months after April 3, 1970.

(3) Any claim for costs incurred by such vessel may be brought directly against the insurer or any other person providing evidence of financial responsibility as required under this subsection. In the case of any action pursuant to this subsection such insurer or other person shall be entitled to invoke all rights and defenses which would have been available to the owner or operator if an action had been brought against him by the claimant, and which would have been available to him if an action had been brought against him by the owner or operator.

(4) The Secretary of Transportation, in consultation with the Secretaries of Interior, State, Commerce, and other interested Federal agencies, representatives of the merchant marine, oil companies, insurance companies, and other interested individuals and organizations, and taking into account the results of the application of paragraph (1) of this subsection, shall conduct a study of the need for and, to the extent determined necessary—

(A) other measures to provide financial responsibility and limitation of liability with respect to vessels using the navigable waters of the United States;

(B) measures to provide financial responsibility for all on-shore and offshore facilities; and

(C) other measures for limitation of liability of such facilities;

for the cost of removing discharged oil and paying all damages resulting from the discharge of such oil. The Secretary of Transportation shall submit a report, together with any legislative recommendations, to Congress and the President by January 1, 1971.

June 30, 1948, c. 758, § 11, as added Apr. 3, 1970, Pub.L. 91-224, Title I, § 102, 84 Stat. 91.

§ 1161. Control of pollution by oil

Financial responsibility of vessels; amount; establishment; effective date; administration of provisions; claim for costs against insurer; study and report on need for financial responsibility of vessels, and onshore and offshore facilities

(p) (1) Any vessel over three hundred gross tons, including any barge of equivalent size, but not including any barge that is not self-propelled and that does not carry oil as cargo or fuel, using any port or place in the United States or the navigable waters of the United States for any purpose shall establish and maintain under regulations to be prescribed from time to time by the President, evidence of financial responsibility of \$100 per gross ton, or \$14,000,000 whichever is the lesser to meet the liability to the United States which such vessel could be subjected under this section. In cases where an owner or operator owns, operates, or charters more than one such vessel, financial responsibility need only be established to meet the maximum liability to which the largest of such vessels could be subjected. Financial responsibility may be established by any one of, or a combination of, the following methods acceptable to the President: (A) evidence of insurance, (B) surety bonds, (C) qualification as a self-insurer, or (D) other evidence of financial responsibility. Any bond filed shall be issued by a bonding company authorized to do business in the United States.

As amended Dec. 31, 1970, Pub.L. 91-611, Title I, § 120, 84 Stat. 1823.

§ 183. Amount of liability; loss of life or bodily injury; privity imputed to owner; "seagoing vessel"

(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection

(b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

(b) In the case of any seagoing vessel, if the amount of the owner's liability as limited under subsection (a) of this section is insufficient to pay all losses in full, and the portion of such amount applicable to the payment of losses in respect of loss of life or bodily injury is less than \$60 per ton of such vessel's tonnage, such portion shall be increased to an amount equal to \$60 per ton, to be available only for the payment of losses in respect of loss of life or bodily injury. If such portion so increased is insufficient to pay such losses in full, they shall be paid therefrom in proportion to their respective amounts.

(c) For the purposes of this section the tonnage of a seagoing steam or motor vessel shall be her gross tonnage without deduction on account of engine room, and the tonnage of a seagoing sailing vessel shall be her registered tonnage: *Provided*, That there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use.

(d) The owner of any such seagoing vessel shall be liable in respect of loss of life or bodily injury arising on distinct occasions to the same extent as if no other loss of life or bodily injury had arisen.

(e) In respect of loss of life or bodily injury the privity or knowledge of the master of a seagoing vessel or of the superintendent or managing agent of the owner thereof, at or prior to the commencement of each voyage, shall be deemed conclusively the privity or knowledge of the owner of such vessel.

(f) As used in subsections (b), (c), (d), and (e) of this section and in section 183b of this title, the term "seagoing vessel" shall not include pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels or their tenders, self-propelled lighters, nondescript self-propelled vessels, canal boats, scows, car floats, barges, lighters, or nondescript non-self-propelled vessels, even though the same may be seagoing vessels within the meaning of such term as used in section 188 of this title. R.S. § 4283; Aug. 29, 1935, c. 804, § 1, 49 Stat. 960; June 5, 1936, c. 521, § 1, 49 Stat. 1479.

ARTICLE III
UNITED STATES CONSTITUTION

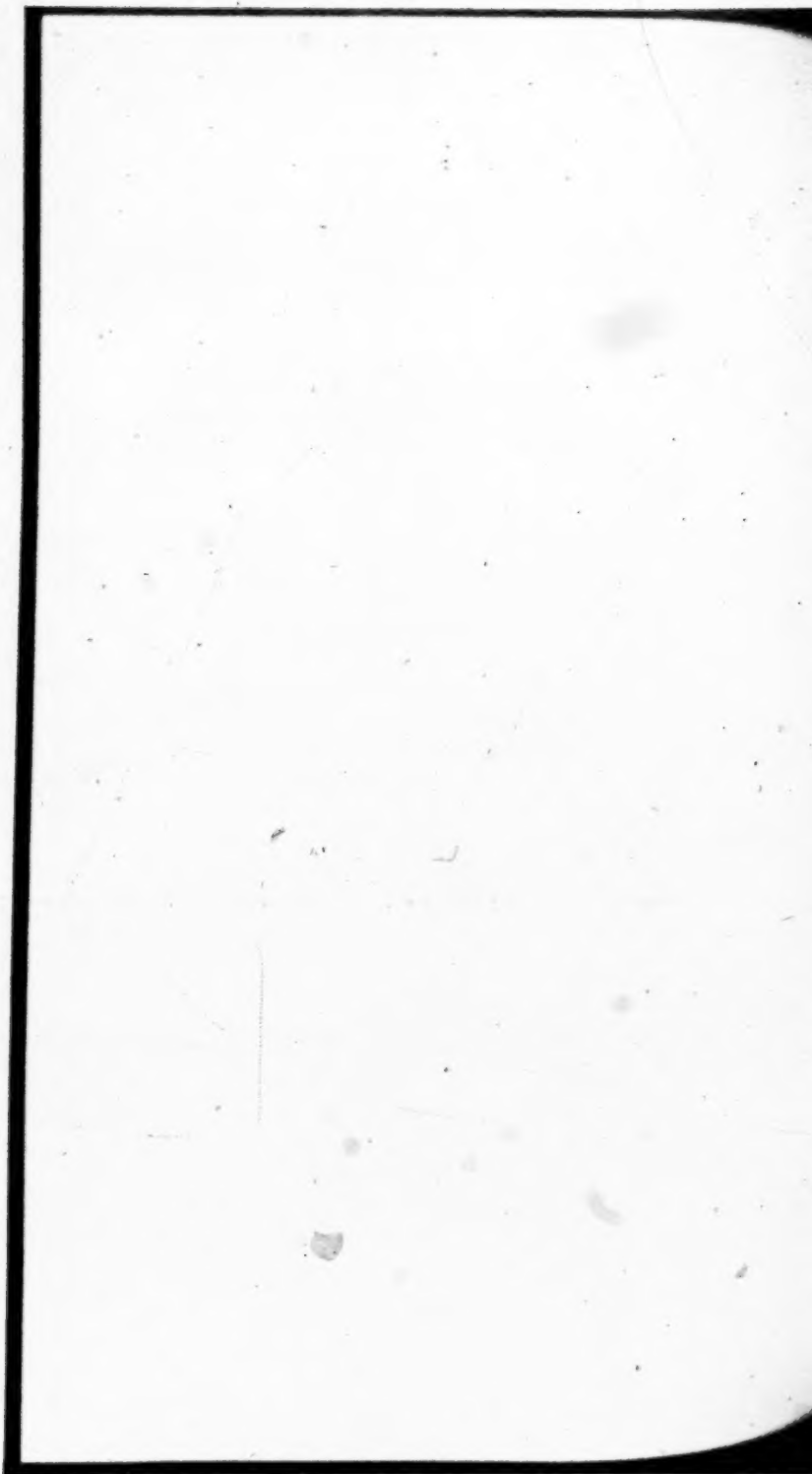
SECTION 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more States; between a State and citizens of another State;--between citizens of different States;--between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects.

AMENDMENT IX.
UNITED STATES CONSTITUTION

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT X
UNITED STATES CONSTITUTION

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.



BLEED THROUGH POOR COPY

ADDENDUM

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

Case No. 71-156-Civ-J

THE AMERICAN WATERWAYS OPERATORS, INC., a Delaware corporation; GULF ATLANTIC TOWING CORPORATION, a Florida corporation; GLIDDENDURKEE, a division of SCM, CORPORATION, a New York corporation; DIXIE CARRIERS, INC., a Delaware corporation; OIL TRANSPORT COMPANY, INCORPORATED, a Louisiana corporation; NATIONAL MARINE SERVICE, INC., a Delaware corporation; NATIONAL MARINE SERVICE, INC., a Delaware corporation; THE REVILO CORPORATION, a Florida corporation; EASTERN SEABOARD PETROLEUM COMPANY, INC., a Florida corporation; NILO BARGE LINE, INC., a Delaware corporation; STEUART TRANSPORTATION COMPANY, a Delaware corporation; INTERSTATE OIL TRANSPORT COMPANY, a Delaware corporation; FEDERAL BARGE LINES, INC., a Delaware corporation; GULF CANAL LINES, INC., a Texas corporation; and INGRAM OCEAN SYSTEM, INC., a Delaware corporation, all authorized to do business in the State of Florida,

Plaintiffs,

and

SUWANNEE STEAMSHIP CO., a Florida corporation; COMMODORES POINT TERMINAL CORPORATION, a Delaware corporation; AMERICAN INSTITUTE OF MERCHANT SHIPPING; ASSURANCE FORENINGEN GARD; ASSURANCE FORENINGEN SKULD; THE BRITANNIA STEAM SHIP INSURANCE ASSOCIATION, LIMITED; THE JAPAN SHIP OWNERS MUTUAL PROTECTING AND INDEMNITY ASSOCIATION; THE LIVERPOOL AND LONDON STEAM SHIP PROTECTION AND INDEMNITY ASSOCIATION, LIMITED; THE LONDON STEAM-SHIP OWNERS' MUTUAL INSURANCE ASSOCIATION, LIMITED; NEW-CASTLE PROTECTION AND INDEMNITY ASSOCIATION; THE NORTH OF ENGLAND PROTECTING & INDEMNITY ASSOCIATION, LIMITED; THE STANDARD STEAMSHIP OWNERS' PROTECTION & INDEMNITY ASSOCIATION; THE STANDARD STEAMSHIP OWNERS' PROTECTION AND INDEMNITY ASSOCIATION (BERMUDA), LIMITED; THE STEAMSHIP MUTUAL UNDERWRITING ASSOCIATION, LIMITED; SUNDERLAND STEAMSHIP PROTECTING AND INDEMNITY ASSOCIATION; SVERIGES ANGFARTYGS ASSURANSFORENING; THE UNITED KINGDOM MUTUAL STEAM SHIP ASSURANCE ASSOCIATION (BERMUDA), LIMITED; THE WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG); and their respective members,

Intervening Plaintiffs,

vs.

REUBIN O'D ASKEW, as Governor of the State of Florida; RICHARD B. STONE, as Secretary of State of the State of Florida; ROBERT L. SHEVIN, as Attorney General of the State of Florida; FLOYD T. CHRISTIAN, as Commissioner of Education of the State of Florida; DOYLE E. CONNOR, as Commissioner of Agriculture of the State of Florida; FRED O. DICKINSON, JR., as Comptroller of the State of Florida; THOMAS D. O'MALLEY, JR., as Treasurer of the State of Florida; as and constituting THE DEPARTMENT OF NATURAL RESOURCES, State of Florida; RANDOLPH HODGES, as Executive Director, and TOM SIMPSON, as Conservation Officer of Duval County, DEPARTMENT OF NATURAL RESOURCES, State of Florida; and THE STATE OF FLORIDA,

Defendants.

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Defendants REUBIN O'D. ASKEW, as Governor of the State of Florida; RICHARD B. STONE, as Secretary of State of the State of Florida; ROBERT L. SHEVIN, as Attorney General of the State of Florida; FLOYD T. CHRISTIAN, as Commissioner of Education of the State of Florida;

PROOF OF SERVICE

I, Daniel S. Dearing, hereby certify that on the 22nd day of December, 1971, I served copies of the foregoing Notice of Appeal on the several parties hereto as follows:

On Plaintiffs THE AMERICAN WATERWAYS OPERATORS, INC.; GULF ATLANTIC TOWING CORPORATION; GLIDDENDURKEE; DIXIE CARRIERS, INC.; OIL TRANSPORT COMPANY, INC.; NATIONAL MARINE SERVICE, INC.; THE REVILO CORPORATION; EASTERN SEABOARD PETROLEUM COMPANY, INC.; STEUART TRANSPORTATION COMPANY; INTERSTATE OIL TRANSPORT COMPANY; FEDERAL BARGE LINES, INC.; GULF CANAL LINES, INC.; INGRAM OCEAN SYSTEM, INC., by mailing three copies to them c/o Ervin, Pennington, Varn & Jacobs, Attorneys for Original Plaintiffs, P. O. Box 1170, Tallahassee, Florida 32302;

and

On Intervening Plaintiffs SUWANNEE STEAMSHIP CO. and COMMODORES POINT TERMINAL CORPORATION by mailing three copies to them c/o KURZ, TOOLE, TAYLOR, MOSELEY & GABEL, Attorneys for the above-named Intervening Plaintiffs, Suite 1014 Barnett Bank Building, 112 West Adam Street, Jacksonville, Florida 32202; and

DOYLE E. CONNER, as Commissioner of Agriculture of the State of Florida; FRED O. DICKINSON, JR., as Comptroller of the State of Florida; THOMAS D. O'MALLEY, JR., as Treasurer of the State of Florida; as and constituting THE DEPARTMENT OF NATURAL RESOURCES, State of Florida; RANDOLPH HODGES, as Executive Director, and TOM SIMPSON, as Conservation Officer of Duval County, Department of Natural Resources, State of Florida; and THE STATE OF FLORIDA, hereby appeal to the Supreme Court of the United States from the final judgment in favor of Plaintiffs and Intervening Plaintiffs entered in this action on December 10, 1971.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted,

ROBERT L. SHEVIN
Attorney General

s/ Daniel S. Dearing
DANIEL S. DEARING
Chief Trial Counsel
Department of Legal Affairs
The Capitol
Tallahassee, Florida 32304

Attorneys for Defendants

On Intervening Plaintiffs AMERICAN INSTITUTE OF MERCHANT SHIPPING; ASSURANCE FORENINGEN GARD; ASSURANCE FORENINGEN SKULD; THE BRITANNIA STEAM SHIP INSURANCE ASSOCIATION, LIMITED; THE JAPAN SHIP OWNERS MUTUAL PROTECTING AND INDEMNITY ASSOCIATION LIMITED; THE LONDON STEAM-SHIP OWNERS' MUTUAL INSURANCE ASSOCIATION, LIMITED; NEWCASTLE PROTECTION AND INDEMNITY ASSOCIATION; THE NORTH OF ENGLAND PROTECTING & INDEMNITY ASSOCIATION, LIMITED; THE STANDARD STEAMSHIP OWNERS' PROTECTION & INDEMNITY ASSOCIATION; THE STANDARD STEAMSHIP OWNERS' PROTECTION AND INDEMNITY ASSOCIATION (BERMUDA), LIMITED; THE STEAMSHIP MUTUAL UNDERWRITING ASSOCIATION, LIMITED; SUNDERLAND STEAMSHIP PROTECTING AND INDEMNITY ASSOCIATION; SVERIGES ANGFARTYGS ASSURANSFORENING; THE UNITED KINGDOM MUTUAL STEAM SHIP ASSURANCE ASSOCIATION (BERMUDA), LIMITED; THE WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG); and their respective members, by mailing three copies to them c/o Fowler, White, Gillen, Humkey, Kinney & Boggs, P. O. Box 1438, Tampa, Florida 33601; Haight, Gardner, Poor & Havens, 80 Broad Street, New York, New York 10004; and Healy & Baillie, 29 Broadway, New York, New York 10006, Attorneys for the above-named Intervening Plaintiffs.

s/ Daniel S. Dearing

DANIEL S. DEARING

Chief Trial Counsel

Department of Legal Affairs

The Capitol

Tallahassee, Florida

BLEED THROUGH POOR COPY

AMICI CURIAE (Cont'd)

Honorable Louis J. Lefkowitz
Attorney General
State of New York
State Capitol
Albany, New York 12225

Honorable Robert B. Morgan
Attorney General
State of North Carolina
P. O. Box 629
Raleigh, North Carolina 27602

Honorable Lee Johnson
Attorney General
State of Oregon
322 State Office Building
Salem, Oregon 97310

Honorable Andrew P. Miller
Attorney General
State of Virginia
Supreme Court - Library Building
Richmond, Virginia 23219

FILE COPY

Supreme Court, U. S.
FILED

MAR 21 1972

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
October Term, 1971

No. 71-1082

REUBIN O'D. ASKEW, et al.,

Appellants,

vs.

THE AMERICAN WATERWAYS OPERATORS, INC., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

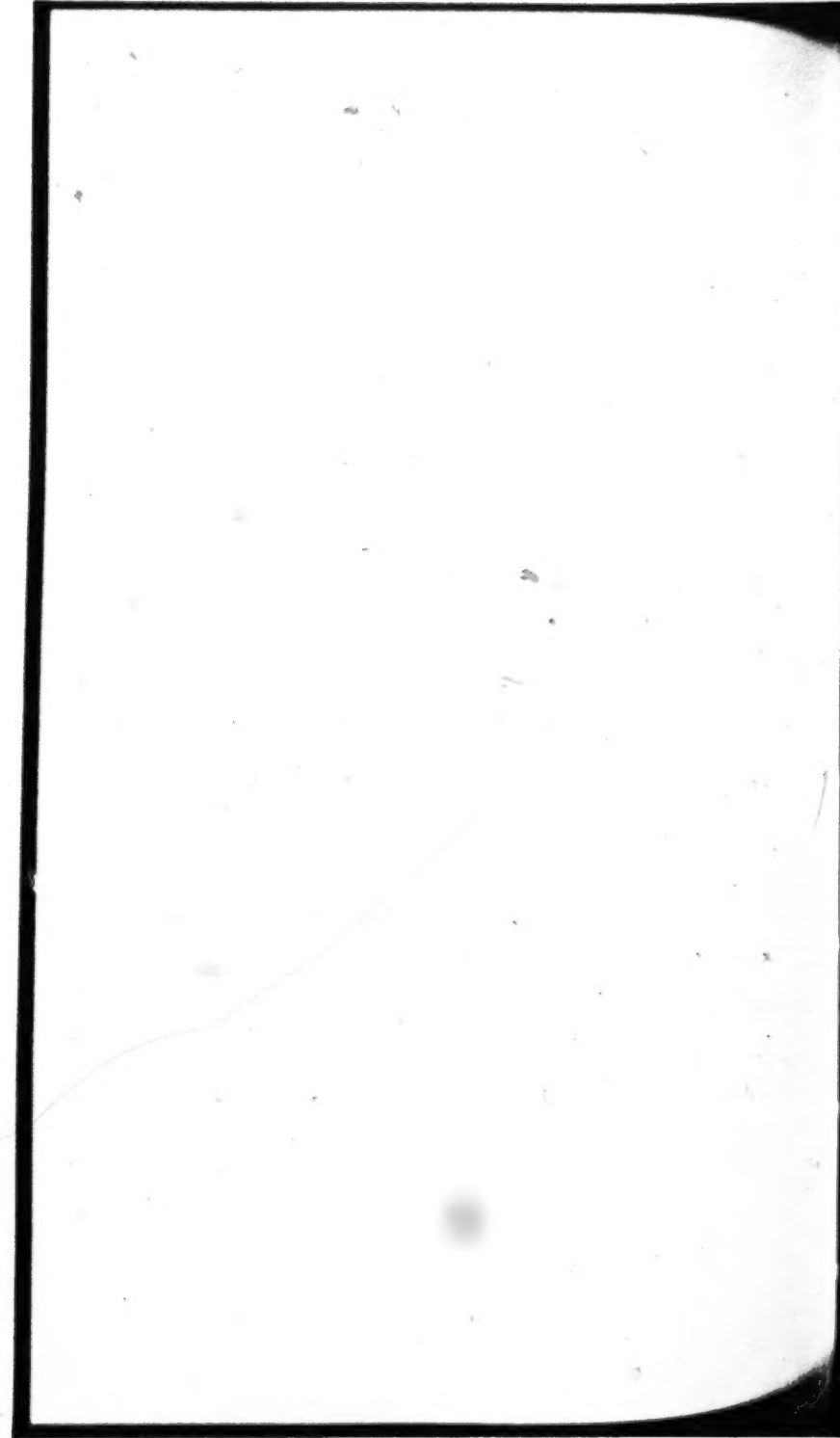
MOTION TO AFFIRM

NICHOLAS J. HEALY
29 Broadway
New York, N.Y. 10006

and

GORDON W. PAULSEN
One State Street Plaza
New York, N.Y. 10004
Attorneys for Appellees,
American Institute of
Merchant Shipping, et al.

JAMES F. MOSELEY
Barnett Bank Building
Jacksonville, Florida 32202
Attorney for Appellees,
Suwannee Steamship Co.,
a Florida Corporation, et al.



IN THE
Supreme Court of the United States

October Term, 1971

No. 71-1082

REUBIN O'D. ASKEW, *et al.*,

Appellants,

vs.

THE AMERICAN WATERWAYS OPERATORS, INC., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

MOTION TO AFFIRM

American Institute of Merchant Shipping, Assuranceforeningen Gard, Assuranceforeningen Skuld, The Britannia Steam Ship Insurance Association, Limited, The Japan Ship Owners Mutual Protecting and Indemnity Association, The Liverpool and London Steam Ship Protection and Indemnity Association, Limited, The London Steamship Owners' Mutual Insurance Association, Limited, Newcastle Protection and Indemnity Association, The North of England Protecting & Indemnity Association, Limited, The Standard Steamship Owners' Protection & Indemnity Association, The Standard Steamship Owners' Protection & Indemnity Association (Bermuda), Limited, The Steamship Mutual Underwriting Association, Limited, Sunderland Steamship Protecting and Indemnity Association, Sveriges Angfartygs Assuransforening, The United Kingdom Mutual Steam Ship Assurance Association (Ber-

muda), Limited, The West of England Ship Owners Mutual Protection and Indemnity Association (Luxembourg), and their respective members, appellees in the above entitled action, by their attorneys, Nicholas J. Healy and Gordon W. Paulsen, and Suwannee Steamship Co., a Florida corporation, Commodores Point Terminal Corporation, a Delaware corporation, appellees in the above entitled action, by their attorney, James F. Moseley, respectfully move to affirm the decision of the three judge federal Court below * on the grounds that it is clearly correct and that the questions presented by Appellants are so unsubstantial as not to require further argument.

Subsection 1(c) of Rule 16 of the Revised Rules of this Court provides:

"The Court will receive a motion to affirm the judgment sought to be reviewed on appeal from a federal court on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument".

The questions raised by Appellants in their Jurisdictional Statement are stated as follows:

"(1) Whether the District Court erred in declaring unconstitutional a statute designed to protect the state, its citizens, and its environment from economic and ecological damage resulting from massive pollution of its territorial waters incident to an occurrence during the transport of oil or other substances by sea, on ground that in Article III, Section 2, Clause 3, United States Constitution, the states surrendered to the federal government all power to enact substantive legislation affecting maritime commerce.

2. Whether the District Court erred in construing the Federal Water Quality Improvement Act of

* Reported at 335 F. Supp. 1241 (M.D. Fla. 1971).

1970, Pub.L. 91-224, 91st Congress, 2d Session (April 3, 1970); 33 U.S.C. § 1161 et seq. as preempting the states from enacting legislation imposing absolute and unlimited liability upon owners or operators of vessels or terminal facilities which cause massive pollution of the state's territorial waters by oil or other substances."

Reasons for Granting the Motion to Affirm

The question of unconstitutionality under Article III, Section 2, Clause 3 of the United States Constitution was thoroughly considered and correctly decided by the Court below. The decision declaring the Florida Act unconstitutional is so clearly in harmony with the decisions of this Court that further argument would simply result in belaboring the obvious. As stated in the opinion below:

"It is well settled that state legislation is invalid where it is in contravention with general admiralty rules or congressional enactments in the maritime field." 335 F. Supp. 1241, at 1248.

After quoting from this Court's opinion in the landmark *Jensen* case,¹ the Court below continued:

"The Florida Act here constitutes a far greater intrusion into the federal maritime domain than the New York statute in the *Jensen* case. If applied to the plaintiffs and intervenors in this case, the Florida Act would effect—in the words of *Jensen*—the 'destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded.'

This is not a situation in which a state legislature has sought to act in an area of purely local concern and its enactment is no real encroachment on fed-

¹ *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917).

eral interests. Rather, this is a case where the State purports to impose upon shipping and related industries duties which under the federal law they do not bear. It can hardly be said that Florida is not seeking to regulate conduct in the federal maritime jurisdiction. We need not belabor the point that to permit the states severally to regulate these industries as Florida seeks to do would sound the death knell to the principle of uniformity.

Defendants argue that, to the extent the Florida Act goes beyond W.Q.I.A., it fills a 'void' in the maritime law and is justifiable under the 'gap theory.'² This theory presupposes that maritime law is an incomplete system, with numerous gaps that can be filled by state statutes. This is to say, if the maritime law affords no remedy, the states may provide one. The Supreme Court's recent decision in *Moragne v. States Marine Lines, Inc.*³ clearly puts such a theory to rest." *Id.*, at 1248-1249.

With respect to Appellants' contention that the Court below erred in construing the Federal Water Quality Improvement Act of 1970 as preempting the states from enacting legislation such as the Florida Act, it is respectfully submitted that the Court below did *not* so hold. The Court below merely commented:

"Another argument advanced by defendants is that the Florida Act is valid under the following provision of W.Q.I.A.:

Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil into any waters within such State. 33 U.S.C. § 1161(o)(2).

It has long been recognized that Congress is powerless to confer on the states authority to legis-

² See, Currie, "Federalism and the Admiralty," *The Supreme Court Review* 1960, 158 at 166-73.

³ 398 U.S. 375 (1970).

late within the admiralty jurisdiction [*Knickerbocker Ice Company v. Stewart*, 253 U.S. 149 (1920); *The Lottawanna*, 21 Wall. 558 (1875); *The Steamer St. Lawrence*, 1 Bl. 522 (1862)] and we cannot presume that W.Q.I.A. was an attempt to do so. There is nothing in the language of the act which purports to grant any such legislative authority to the states. The statement that Congress did not intend to preclude state imposed liability for oil pollution simply means that the states are free to enforce pollution control measures that are within their constitutional prerogative." *Id.*, at 1249.

These Appellees submit that the Court's comment is correct, and that the second "question" raised by Appellants is in reality no question at all.

CONCLUSION

The decision below is clearly correct and this appeal presents no substantial question; the judgment of the three judge Court below should therefore be affirmed without further argument.

Dated: March 20, 1972

Respectfully submitted,

NICHOLAS J. HEALY

GORDON W. PAULSEN

Attorneys for Appellees, American Institute of Merchant Shipping, et al.

JAMES F. MOSELEY

Attorney for Appellees, Suwannee Steamship Co., a Florida Corporation, et al.

FILE COPY

U.S. DISTRICT COURT
FILED

MAY 21 1972

U.S. DISTRICT COURT

IN THE

Supreme Court of the United States

October Term, 1971

NO. 71-1062

REUBIN O'D. ASKEW, et al.,

Appellants,

-vs-

THE AMERICAN WATERWAYS

OPERATORS, INC., et al.,

Appellees.

On Appeal from the United States District Court
for the Middle District of Florida

**BRIEF OF THE STATE OF GEORGIA,
AMICUS CURIAE, IN SUPPORT OF THE
JURISDICTIONAL STATEMENT OF APPELLANTS**

ARTHUR K. BOLTON
Attorney General

HAROLD N. HILL, Jr.
Executive Assistant

Attorney General

ALFRED L. EVANS, JR.
Assistant Attorney General

JAMES B. TALLEY
Assistant Attorney General

COURTNEY WILDER STANTON
Assistant Attorney General

PLEASE ADDRESS ALL
COMMUNICATIONS TO:

ALFRED L. EVANS, JR.
Assistant Attorney General
152 State Judicial Building
40 Capitol Square
Atlanta, Georgia 30334
Telephone (404) 436-3330

INDEX

	Page
INTEREST OF AMICUS CURIAE	1
QUESTIONS PRESENTED	3
STATEMENT OF THE CASE	5
THE QUESTIONS ARE SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION, WITH BRIEFS ON THE MERITS AND ORAL ARGUMENT FOR THEIR RESOLUTION	9
1. Whether the district court's holding that Florida's legislative protection of its beaches, tide lands and public lands adjoining its seacoast from oil spill and similar pollution infringes upon "the exclusive federal admiralty domain", conflicts with Supreme Court decisions that torts consummated on land are outside the scope of federal admiralty jurisdiction?.....	9
2. Whether the Admiralty Extension Act (46 U.S.C.A. § 740), which attempts to extend admiralty jurisdiction over torts shoreward so as to include injuries caused by a vessel on navigable waters "notwithstanding that such damage or injury be done or consummated on land", is facially violative of Article III, Section 2, Cl. 1 of the United States Consti- tution, or, if not, whether the Admiralty Extension Act would be unconstitutional as applied to those particular torts towards which the Florida legislation is primarily directed?.....	12
(a) Facial Invalidity	12
(b) Invalidity as applied	14
3. Whether state legislation to protect beaches, marsh lands and non-navigable waters from	

INDEX—continued

	Page
injury due to oil spill and similar contaminating discharges on offshore waters, if not wholly outside the constitutionally authorized scope of federal admiralty jurisdiction, is nonetheless permitted to the States by the "saving" clause of 28 U.S.C.A. § 1333? _____	16
4. Whether a State may exercise its police powers to protect its property and the health and well being of its citizens through legislation affecting maritime matters if such legislation does not "conflict" with federal maritime law? _____	19
5. Whether any "conflict" exists between Florida's "Oil Spill Prevention and Pollution Control Act of 1970" and federal maritime law, and if so, whether such conflict is of such nature and scope as would justify the invalidating of Florida's entire Act rather than only those points of actual conflict? _____	20
CONCLUSION _____	22

TABLE OF AUTHORITIES

CASES

	Page
<i>C. J. Hendry Co. v. Moore</i> , 318 U.S. 133 (1943) _____	17, 19
<i>Cleveland Terminal and Valley Railroad Company v. Cleveland Steamship Company</i> , 208 U.S. 316 (1908) _____	11
<i>Detroit Trust Co. v. The Thomas Barlum</i> , 293 U.S. 21 (1934) _____	11
<i>Ex Parte Phenix Insurance Co.</i> , 118 U.S. 610 (1886) _____	11, 13, 15

TABLE OF AUTHORITIES—continued

	Page
<i>Gutierrez v. Waterman Steamship Corp.</i> , 373 U.S. 206, 210 (1963) _____	15
<i>Huron Portland Cement Co. v. City of Detroit</i> , 362 U.S. 440 (1960) _____	19
<i>In Re Harbor Towing Corporation</i> , ____ F.Supp. _____, 3 Environment Reporter— Cases 1607 (D.Md. No. 70-20-N, decided Nov. 10, 1971) _____	22
<i>Insurance Company v. Dunham</i> , 11 Wall. (78 U.S.) 1 (1870) _____	13
<i>Johnson v. Chicago and Pacific Elevator Company</i> , 119 U.S. 388 (1886) _____	11, 13
<i>Just v. Chambers</i> , 312 U.S. 383 (1941) _____	20
<i>Knapp, Stout & Co. v. McCaffrey</i> , 177 U.S. 638 (1900) _____	17
<i>Knickerbocker Ice Co. v. Stewart</i> , 253 U.S. 149 (1920) _____	18
<i>London Guarantee & Accident Company v. Industrial Accident Commission of California</i> , 279 U.S. 109 (1929) _____	11
<i>Manchester v. Massachusetts</i> , 139 U.S. 240 (1891) _____	18, 19, 20
<i>Morgan's Steamship Company v. Louisiana Board of Health</i> , 118 U.S. 455 (1886) _____	2, 19
<i>North Pacific Steamship Company v. Hall Brothers Marine Railway and Shipbuilding Company</i> , 249 U.S. 119 (1919) _____	11, 13

TABLE OF AUTHORITIES—continued

	Page
<i>Panama Railroad Company v. Vasquez</i> , 271 U.S. 557 (1926) _____	18
<i>Petition of New York Trap Rock Corporation</i> , 172 F.Supp. 638 (S.D.N.Y. 1959) _____	17
<i>Red Cross Line v. Atlantic Fruit Co.</i> , 264 U.S. 109 (1924) _____	17, 20
<i>Revel v. American Export Lines, Inc.</i> , 162 F.Supp. 279 (E.D. Va. 1958) _____	17
<i>Richardson v. Harmon</i> , 222 U.S. 96 (1911) _____	22
<i>Southern Pacific Company v. Jensen</i> , 244 U.S. 205 (1917) _____	18
<i>State Department of Fish and Game v. S.S.</i> <i>Bournemouth</i> , 307 F.Supp. 922 (C.D. Calif. 1969) _____	17
<i>The Blackheath</i> , 195 U.S. 361 (1904) _____	13
<i>The Genesee Chief</i> , 12 How. (53 U.S.) 443 (1851) _____	11, 13
<i>The Lottawana</i> , 21 Wall. (88 U.S.) 558 (1874) _____	11
<i>The Panoil</i> , 266 U.S. 433 (1925) _____	11
<i>The Plymouth</i> , 3 Wall. (70 U.S.) 20 (1865) _____	11, 13, 15
<i>The Troy</i> , 208 U.S. 321 (1908) _____	11, 13
<i>United States v. Matson Navigation Co.</i> , 201 F.2d 610 (9th Cir. 1952) _____	14, 15
<i>Victory Carriers v. Law</i> , 404 U.S. _____, 30 L.Ed.2d 383 (1971) _____	11, 12, 14

TABLE OF AUTHORITIES—continued

Page

Waring v. Clarke, 5 How. (46 U.S.) (1847).....16

UNITED STATES CONSTITUTION

Art. III, Sec. 2, Cl. 13, 4, 10, 12, 13, 15

FEDERAL STATUTES

Judiciary Act of 1789, 1 Stat. 7316

28 U.S.C.A. § 13334, 16, 17, 18, 19, 20

Water Quality Improvement Act of 1970,

84 Stat. 91 (33 U.S.C.A.

§ 1161)5, 6, 7, 8, 9, 21

33 U.S.C.A. § 1162 6

Limitation of Liability Act, 46 U.S.C.A. §183.....22

Admiralty Extension Act, 46 U.S.C.A.

§ 7404, 12, 13, 14, 18

STATE STATUTES

Florida—Oil Spill Prevention and Pollution

Control Act of 1970, Chapt. 70-244,

Laws of Florida (Fla. Stat. Ann.

Chapt. 376)7, 8, 10, 14

Maryland—Md. Code Ann. Art. 96A § 29

(1971 Cumulative Supplement)7

MISCELLANEOUS

Senate Report No. 1593, 80th Cong.2d Sess.,

U.S. Code Cong. Svc. (1948),

pp. 1898 et seq.17

BLEED THROUGH POOR COPY

IN THE

Supreme Court of the United States

October Term, 1971

NO. 71-1082

REUBIN O'D. ASKEW, et al.,

Appellants,

-vs-

THE AMERICAN WATERWAYS
OPERATORS, INC., et al.,

Appellees.

On Appeal from the United States District Court
for the Middle District of Florida

BRIEF OF THE STATE OF GEORGIA,
AMICUS CURIAE, IN SUPPORT OF THE
JURISDICTIONAL STATEMENT OF APPELLANTS

INTEREST OF AMICUS CURIAE

Almost ninety years ago this Court upheld the right of Louisiana to protect its citizens from yellow fever and cholera by subjecting all vessels approaching New Orleans to an inspection and the payment of an inspection

fee. See *Morgan's Steamship Company v. Louisiana Board of Health*, 118 U.S. 455 (1886). While these scourges of the Nineteenth Century have been largely conquered, the same cannot be said of that great plague of the Twentieth Century—pollution—which now bids fair to imperil mankind's very existence.

Like Louisiana, Georgia is a coastal state. We think that Georgia's interest in protecting its citizens from the ravages of sea-borne pollution today is at least as great as was Louisiana's interest in protecting its citizens from the ravages of sea-borne yellow fever and cholera in 1886. The consequences of pollution in the form of oil spill or similar contaminating discharges upon the State's off-shore waters are not limited simply to the loss of tourists disinclined to bask on beaches befouled by oil or other unappealing substances. Far more important than the risk of damage to the State's beaches (although Georgia's beaches are themselves quite worthy of protection) is the peril to the vast marsh lands and non-navigable waters of the State which as spawning grounds are so vital to aquatic and marine life and the industries dependent upon such life. The effect of pollution damage here might not be limited to the present generation. It could very well bear heavily upon the health and well being of many generations of Georgians who are as yet unborn.

It is scarcely surprising that the interest of Georgia in protecting its beaches, marsh lands and non-navigable waters from pollution emanating from oil spill or similar contaminating discharges upon its coastal waters gives rise to more than a little anxiety over the case at bar. A three-judge district court has held that Florida's "Oil Spill Prevention and Pollution Control Act of 1970",

designed to protect that State's beaches, tidal flats, estuaries, and public lands adjoining the seacoast against oil spill and similar contamination, constitutes an "unlawful intrusion into the exclusive federal admiralty domain". Particularly in light of the fact that this Court has many times in the past noted that torts consummated on land or non-navigable waters are wholly beyond the limits of federal admiralty jurisdiction, the State of Georgia has an obvious interest in knowing not only whether federal admiralty jurisdiction is to be permitted to intrude (or even whether it is constitutionally able to intrude) into areas which in the past were indisputably within the State's jurisdiction, but whether this extension of federal jurisdiction, if it is indeed permissible at all, is to be of such magnitude as to wholly terminate any concurrent right of the State to protect its own property and the health and well being of its citizens from sea-borne pollution—particularly where the expressly stated intentment of Congress is that the states are *not* to lose this important right.

QUESTIONS PRESENTED

The ultimate question raised by the district court's decision in this case is whether the vesting of admiralty jurisdiction in the United States under Article III, Section 2, Cl. 1 of the Constitution is to be construed so as to prevent a state from taking legislative action to protect its beaches, marsh lands, coastal properties, non-navigable waters and the health and well being of its citizens against the ravages of pollution emanating from oil spill and similar contaminating discharges upon its coastal waters.

It is the view of the State of Georgia, however, that

this ultimate question is really enmeshed in and dependent upon the answer to a number of vital questions relating to the constitutional and statutory limits of federal admiralty and maritime jurisdiction. We think these controlling questions, all of which seem to have been given scant attention by the court below, are as follows:

1. Whether the district court's holding that Florida's legislative protection of its beaches, tide lands and public lands adjoining its seacoast from oil spill and similar pollution infringes upon "the exclusive federal admiralty domain", conflicts with Supreme Court decisions that torts consummated on land are outside the scope of federal admiralty jurisdiction?
2. Whether the Admiralty Extension Act (46 U.S.C.A. § 740), which attempts to extend admiralty jurisdiction over torts shoreward so as to include injuries caused by a vessel on navigable waters "notwithstanding that such damage or injury be done or consummated on land", is facially violative of Article III, Section 2, Cl. 1 of the United States Constitution, or, if not, whether the Admiralty Extension Act would be unconstitutional as applied to those particular torts towards which the Florida legislation is primarily directed?
3. Whether state legislation to protect beaches, marsh lands and non-navigable waters from injury due to oil spill and similar contaminating discharges on off-shore waters, if not wholly outside the constitutionally authorized scope of federal admiralty jurisdiction, is nonetheless permitted to the States by the "saving" clause of 28 U.S.C.A. § 1333?

4. Whether a State may exercise its police powers to protect its property and the health and well being of its citizens through legislation affecting maritime matters if such legislation does not "conflict" with federal maritime law?
5. Whether any "conflict" exists between Florida's "Oil Spill Prevention and Pollution Control Act of 1970" and federal maritime law, and if so, whether the conflict is of such nature and scope as would justify the invalidating of Florida's entire Act rather than only those points of actual conflict?

STATEMENT OF THE CASE

The frightful effect upon beaches, marsh lands and non-navigable waters of oil spill and similar contaminating discharges into coastal waters has with good reason invoked legislative responses at various levels of government. On the national level Congress has enacted the "Water Quality Improvement Act of 1970", 84 Stat. 91 (33 U.S.C.A. § 1161), which subjects the owner or operator of a vessel, onshore facility, or offshore facility to a specified degree of liability without fault for those cleanup costs incurred by the federal government, as well as to full liability for cleanup costs where the oil spillage is the result of willful negligence or willful misconduct within the privity and knowledge of the owner. 33 U.S.C.A. § 1161(f). The same section makes these costs a maritime lien on the vessel (*Ibid.*). The federal act also requires vessels of over 300 tons using navigable waters or any port or place in the United States to show evidence of financial responsibility to meet the liability to the United States to which the vessel could be subjected. 33 U.S.C.A. § 1161(p). The President of the

United States is directed to promulgate regulations establishing procedures for the removal of discharged oil and requirements for equipment to prevent oil discharges from vessels, onshore facilities and offshore facilities. 33 U.S.C.A. § 1161(j). Although the federal act presently deals with oil spills only, it does contemplate future congressional action regarding hazardous substances other than oil—based upon recommendations the President is directed to make to Congress. 33 U.S.C.A. § 1162(a)(g).

It is important to note, however, that the federal legislation speaks solely of suits by the federal government to recover *its* (i.e., the federal government's) cleanup costs, 33 U.S.C.A. § 1161(f), or to compel compliance, 33 U.S.C.A. § 1161(e). Possibly for this reason, or perhaps as an expression of public policy favoring the existence of as many concurrent actions and remedies as possible to fight pollution, the federal legislation clearly contemplates parallel actions by State or local government where pollution injury to fish, shellfish, wildlife, public health and public or private property is threatened. 33 U.S.C.A. § 1161(e). And it expressly disavows any intent of Congress to prevent the States from enacting parallel legislation to protect *their* property as well as the property, health and well being of their citizens. 33 U.S.C.A. § 1161(o) provides:

“(1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency under any provision of law for damages to any publicly-owned or privately-owned property resulting from a discharge of any oil or from the removal of any such oil.

(2) Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil into any waters within such State.

(3) Nothing in this section shall be construed as affecting or modifying any other existing authority of any Federal department, agency, or instrumentality, relative to onshore or offshore facilities under this chapter or any other provision of law, or to affect any State or local law not in conflict with this section."

Florida¹ accepted the congressional invitation to legislate and enacted its "Oil Spill Prevention and Pollution Control Act of 1970", Chapter 70-244, Laws of Florida; Fla. Stat. Ann. Chapt. 376. The Florida Act parallels the federal legislation by prohibiting the discharge of oil (Florida, however, also prohibiting the discharge of any other pollutant) upon its coastal waters, estuaries, beaches, tidal flats, and lands adjoining the seacoast. Fla. Stat. Ann. § 376.041. Similar to the federal legislation it requires vessels transporting pollutants within State waters to carry such containment gear as may be specified by regulations of the State Department of Natural Resources, Fla. Stat. Ann. § 376.07. And Florida too requires the owner of a vessel to show evidence of financial responsibility (although here the State legislation is broader than the federal in that it applies to all vessels rather than only those exceeding 300 gross tons)¹. Compare Fla. Stat. Ann. § 376.14 with 33 U.S.C.A. § 1161(p). Perhaps the most significant difference be-

¹Maryland also appears to have enacted oil spill and anti-pollution legislation subsequent to enactment of the federal "Water Quality Improvement Act of 1970". See, Md. Code Ann. Art. 96A § 29 (1971 Cumulative Supplement).

tween the two anti-pollution acts is the greater measure of liability which Florida imposes upon the polluter. While liability without fault to the United States for its cleanup costs is limited to \$100 per gross ton of the vessel or \$14,000,000 (whichever is lesser), see 33 U.S.C.A. § 1161(f), the Florida Act provides for full liability for *all* cleanup costs and all other damages incurred by the State, as well as for all damages resulting from injury to others. Fla. Stat. Ann. § 376.12.

The case at bar was initiated on March 9, 1971, by a number of merchant shippers and shipping associations. Their complaint, filed in the United States District Court for the Middle District of Florida, Jacksonville Division, contended that Florida's "Oil Spill Prevention and Pollution Control Act of 1970" was unconstitutional among other reasons because it sought to legislate substantive maritime law, which under the Constitution was said to repose exclusively within the federal domain. A three-judge district court was convened and on December 10, 1971, that court held the Florida legislation to be void *in toto* under Article III, Section 2 of the United States Constitution. While noting differences in the treatment of oil spill pollution under the federal "Water Quality Improvement Act of 1970)" and Florida's parallel legislation, the district court in fact did not base its decision upon the theory of a "conflict" between provisions of the two acts. It instead considered existing differences to be evidence that Florida's legislation involved a subject matter beyond its competency to deal with. See, "*Memorandum Opinion and Final Judgment*", *Appendix to Appellants' Brief*, pp. 4, 15-16. The decision was squarely predicted, in other words, upon the theory that "the Florida Act constitutes unlawful intrusion into the

exclusive federal admiralty domain". Concerning the federal Water Quality Improvement Act's express contemplation of parallel State action in 33 U.S.C.A. § 1161(o), the district court said simply that "Congress is powerless to confer upon the states authority to legislate within the admiralty jurisdiction", and that it would not presume that 33 U.S.C.A. § 1161(o) was an attempt to do so. It "construed" the Congressional intendment of the provision to mean nothing more than that states were free to enforce pollution control measures within their constitutional prerogative. With the greatest respect for the court below we believe that examination of the past decisions of this Court will show not only that Florida's "Oil Spill Prevention and Pollution Control Act of 1970" does *not* constitute an unlawful intrusion into the exclusive federal admiralty domain, but that it is rather the attempted expansion of the scope of the *exclusive* federal admiralty domain, under the district court's decision, which unlawfully intrudes upon Florida's right to protect its own lands and the physical, economic and social well being of its citizens.

**THE QUESTIONS ARE SO SUBSTANTIAL AS TO
REQUIRE PLENARY CONSIDERATION, WITH
BRIEFS ON THE MERITS AND ORAL ARGUMENT
FOR THEIR RESOLUTION**

1. Whether the district court's holding that Florida's legislative protection of its beaches, tide lands and public lands adjoining its seacoast from oil spill and similar pollution infringes upon "the exclusive federal admiralty domain", conflicts with Supreme Court decisions that torts consummated on land are outside the scope of federal admiralty jurisdiction?

The often catastrophic result of oil spill and similar contaminating discharges from ships and watercraft lies not in their being dropped on navigable waters but in their reaching the shore. It is here, on the beaches, marshes and non-navigable waters of a state that the chief damage is done, and it is to this injury, consummated on land and non-navigable waters, that Florida's "Oil Spill Prevention and Pollution Control Act of 1970" is chiefly directed. The district court nonetheless held that this attempt of a state to protect its own property as well as the health and well being of its citizens was impermissible because the subject matter falls within the *exclusive* federal admiralty jurisdiction.

We respectfully submit that in evaluating this conclusion, the more appropriate starting point is not the question of whether federal admiralty jurisdiction over the subject matter is "exclusive" rather than concurrent with state law jurisdiction, but is the very critical threshold question of whether in light of past Supreme Court decisions federal admiralty jurisdiction can be said to exist at all with respect to oil spill and similar contaminating discharges upon navigable waters where the principal injury complained of and legislated against is one which is consummated on land, marsh lands, or non-navigable waters of the state.

In the absence of any language in the Constitution defining the boundaries of the "admiralty and maritime" jurisdiction vested in the federal government under Article III, Section 2, Cl. 1, it was early concluded that in its constitutional usage this term has reference to the general system, scope and jurisdictional limits of admiralty law as known and understood by lawyers in the United States at the time the Constitution was adopted.

See, e.g., *The Genesee Chief*, 12 How. (53 U.S.) 443, 453 (1851); *The Lottawana*, 21 Wall. (88 U.S.) 558, 574-575 (1874). *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21, 43-44 (1934). This Court has consistently held that with respect to torts, the question of whether or not an occurrence falls within or without the constitutional scope of admiralty jurisdiction depends upon where it took place, or its "locality". E.g., *North Pacific Steamship Company v. Hall Brothers Marine Railway and Shipbuilding Company*, 249 U.S. 119, 125 (1919); *London Guarantee & Accident Company v. Industrial Accident Commission of California*, 279 U.S. 109, 123-24 (1929); *Victory Carriers v. Law*, 404 U.S. _____, 30 L.Ed.2d 383, 387-389 (Dec. 13, 1971). And most important of all with respect to the problem at hand is the fact that this "locality" test itself turns not upon where the forces causing the injury were set in motion but where the injury is consummated. E.g., *The Plymouth*, 3 Wall. (70 U.S.) 20 (1865); *Ex Parte Phenix Insurance Co.*, 118 U.S. 610, 618 (1886); *Johnson v. Chicago and Pacific Elevator Company*, 119 U.S. 388, 397 (1886); *Cleveland Terminal and Valley Railroad Company v. Cleveland Steamship Company*, 208 U.S. 316, 319-20 (1908); *The Troy*, 208 U.S. 321 (1908); *The Panoil*, 266 U.S. 433 (1925).

We think that the same legal principle which caused fire damage to shore structures ignited by sparks from the smokestack of a passing steamer to fall outside admiralty jurisdiction in *Ex Parte Phenix Insurance Co.*, 118 U.S. 610, 618 (1886), applies equally to damage to beaches, marshes and non-navigable waters from oil spill or similar pollutants emitted from a vessel. We think the district court erred in failing to apply the "locality" test

and in consequently failing to hold the Florida legislation to be wholly outside the scope of the admiralty and maritime jurisdiction conferred upon the federal government under Article III, Section 2, Cl. 1 of the Constitution.

2. Whether the Admiralty Extension Act (46 U.S.C.A. § 740), which attempts to extend admiralty jurisdiction over torts shoreward so as to include injuries caused by a vessel on navigable waters "notwithstanding that such damage or injury be done or consummated on land", is facially violative of Article III, Section 2, Cl. 1 of the United States Constitution, or, if not, whether the Admiralty Extension Act would be unconstitutional as applied to those particular torts towards which the Florida legislation is primarily directed?

(a) *Facial Invalidity*

In *Victory Carriers v. Bill Law*, 404 U.S. —, 30 L.Ed.2d 383 (Dec. 13, 1971), this Court, after discussing its long support of the "locality" test in connection with the limits of admiralty jurisdiction over torts, took note of the fact that the Admiralty Extension Act, 62 Stat. 496, 46 U.S.C.A. § 740, had survived constitutional attack "in the lower federal courts", but gave no indication as to whether or not it agreed with the three lower court decisions to which it referred. It would therefore seem that this Court has tacitly acknowledged that the question remains open.

As we see it, careful analysis of this Court's past decisions leads to the conclusion that any attempt by Congress to extend federal admiralty jurisdiction shoreward so as to gather into its fold those torts which are consummated on land is unconstitutional on its face, with

the three lower court opinions to the contrary being plainly erroneous. To start with, we think the decisions of this Court to which we have already referred, e.g., *The Plymouth* 3 Wall. (70 U.S.) 20 (1865); *Ex Parte Phenix Insurance Co.*, 118 U.S. 610 (1886); *Johnson v. Chicago and Pacific Elevator Company*, 119 U.S. 388 (1886), and *North Pacific Steamship Company v. Hall Brothers Marine Railway and Shipbuilding Company*, 249 U.S. 119, 125 (1919), considered together and in the light of such other decisions as *The Genesee Chief*, 12 How. (53 U.S.) 443, 453 (1851), leave no doubt but that they were dealing with nothing less than the constitutional limits of admiralty jurisdiction over torts. Certainly this was the interpretation which this Court placed upon its own prior decisions in *The Blackheath*, 195 U.S. 361, 367 (1904). See also, *The Troy*, 208 U.S. 321, 323 (1908).

Moreover, any possible contention that these decisions were based upon the jurisdiction granted by Congress under the Judiciary Act rather than upon Article III, Section 2, Cl. 1 limitations is demolished by the fact that this Court has flatly stated that the legislative grant (i.e., prior to enactment of the Admiralty Extension Act) was co-extensive with the constitutional grant. See, *Insurance Company v. Dunham*, 11 Wall. (78 U.S.) 1, 23 (1870). Obviously, water cannot be added to the flask which has already been filled.

We respectfully submit that this question of the facial invalidity of the Admiralty Extension Act under Article III, Section 2, Cl. 1 (the Act's validity seemingly being a *sine qua non* of the district court's decision that the Florida legislation was void *in toto* as an "unlawful intrusion into the exclusive federal admiralty domain")

is at the very least an extremely important question which has not yet been passed upon by this Court. Pertinent to the desirability of plenary consideration with briefs on the merits and oral argument, we think, are the words of this Court in *Victory Carriers v. Bill Law*, 404 U.S. _____, 30 L.Ed.2d 383, 391 (Dec. 13, 1971):

"We are dealing with the intersection of federal and state law. As the law now stands, state law had traditionally governed accidents like this one. To afford respondent a maritime cause of action would thus intrude on an area that has heretofore been reserved to state law, would raise difficult questions concerning the extent to which state law would be displaced or preempted. . . . In these circumstances, we should proceed with caution in construing constitutional and statutory provisions dealing with the jurisdiction of the federal courts."

(b) *Invalidity as applied*

Even if the Admiralty Extension Act's attempt to extend federal admiralty jurisdiction (so as to include injuries consummated on land) were not unconstitutional on its face, it would not necessarily follow that the Act could constitutionally be applied to those particular wrongs towards which Florida's "Oil Spill Prevention and Pollution Control Act of 1970" is primarily directed (i.e., pollution damage to beaches, tidal flats, non-navigable waters and lands adjoining the seacoast). The only Court of Appeals decision we are aware of which has upheld the Admiralty Extension Act's constitutionality did so upon the rationale that the particular tort before it (a vessel on navigable waters running into a dike) was indeed within the scope of admiralty jurisdiction as it was understood at the time the Constitution was adopted. See, *United States v. Matson Navigation*

Co., 201 F.2d 610 (9th Cir. 1953). While we think this conclusion is itself quite erroneous because it misreads or misunderstands the constitutional import of *The Plymouth*, *supra*; *Ex Parte Phenix Insurance Co.*, *supra*, and the various other Supreme Court decisions we have discussed, it is also important to note that the only direct authority which the Court of Appeals was able to muster in support of its conclusion was a statute of Louis XIV of France which defined French admiralty jurisdiction to include quais, dikes, jetties, palisades and other works erected against the violence of the sea", see 201 F.2d at 615 fn.9. Even assuming the correctness of the Court of Appeals rationale, conclusion and decision, would it not be stretching things more than a little to say that beaches, marshes, non-navigable waters and lands adjoining the seacoast are of the same class of man made objects "erected against the violence of the sea" as were the items placed within admiralty jurisdiction by Louis XIV?

Finally, it might also be pointed out that in *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206, 210 (1963), this Court indicated that for the Admiralty Extension Act to apply to a land consummated tort (the constitutionality of the Act apparently not having been raised in that case) the impact must be felt ashore "at a time and place not remote from the wrongful act". We think that in the case of an oil spill or similar contaminating discharges from a vessel, the impact on shore would almost always be some distance from and some time later than the wrongful act.

In summary, we think that even if the Admiralty Extension Act were not facially violative of Article III, Section 2, Cl. 1 of the Constitution, it would still be an

unconstitutional application to hold that it can expand federal admiralty jurisdiction so as to cover those particular torts towards which the Florida "Oil Spill Prevention and Pollution Control Act of 1970" is chiefly directed.

3. Whether state legislation to protect beaches, marsh lands and non-navigable waters from injury due to oil spill and similar contaminating discharges on its off-shore waters, if not wholly outside the constitutionally authorized scope of federal admiralty jurisdiction, is nonetheless permitted to the States by the "saving" clause of 28 U.S.C.A. § 1333?

While vesting the federal courts with exclusive jurisdiction over admiralty proceedings, 28 U.S.C.A. § 1333 qualifies and limits the scope of this grant by:

"... saving to suitors in all cases all other remedies to which they are entitled."²

Construing similar language in the Judiciary Act of 1789, 1 Stat. 73 [i.e., "saving and reserving to suitors in all cases a common law remedy where the common law is competent to give it"], this Court said in *Waring v. Clarke*, 5 How. (46 U.S.) 441, 461 (1847), that the meaning of the "saving" clause was:

"... that in cases of concurrent jurisdiction in admiralty and common law, the jurisdiction in the latter is not taken away. The saving is for the benefit of suitors, plaintiff and defendant, when the

²While in our discussion of the constitutionality of the Admiralty Extension Act we were referring to the authority of Congress to legislate with respect to torts consummated on land, marshes and non-navigable waters, the "saving" clause also pertains to state jurisdiction respecting incidents or transactions upon navigable territorial waters.

plaintiff in a case of concurrent jurisdiction chooses to sue in the common law courts, so giving to himself and the defendant all the advantages which such tribunals can give to suitors in them."

Even under the if anything more restricted language of the "saving" clause as it appeared in the Judiciary Act of 1789, it was recognized that the reference to "common law" remedies did not restrict the states to the then existing common law forms or preclude the creation of new rights under statutory enactments so long as the remedy was of a type recognized at common law, see *C. J. Hendry Co. v. Moore*, 318 U.S. 133 (1943); *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109 (1924), including equity. *Knapp, Stout & Co. v. McCaffrey*, 177 U.S. 638 (1900).

The Admiralty Extension Act's legislative history shows that it was not intended to curtail the scope or operation of the "saving" clause, see Senate Report No. 1593, 80th Cong.2d Sess., U.S. Code Cong. Service 1948, pp. 1898, 1899-1900, and the courts have uniformly held that it doesn't. See, e.g., *State Department of Fish and Game v. S S. Bournemouth*, 307 F.Supp. 922, 925 (C.D. Calif. 1969); *Revel v. American Export Lines, Inc.*, 162 F.Supp. 279, 283 (E.D. Va. 1958), *aff'd*. 266 F.2d 82 (4th Cir. 1959). As stated in *Petition of New York Trap Rock Corporation*, 172 F.Supp. 638, 646 (S.D.N.Y. 1959):

"It [the Admiralty Extension Act] made a new, concurrent remedy in admiralty available for an already existing action at common law."

It consequently seems safe to say that the tort injuries with which the Florida Act is primarily concerned—undisputably beyond the scope of federal admiralty and

maritime jurisdiction and undisputably a proper subject for state legislation prior to enactment of the Admiralty Extension Act—must at least remain within the area of “concurrent” state jurisdiction under the “saving” clause of 28 U.S.C.A. § 1333 after passage of the Admiralty Extension Act. We think that in the case at bar the district court’s holding that it was the *exclusive* federal admiralty domain into which the Florida legislation intruded, is erroneous, among other reasons, because it wholly overlooks the existence and effect of the “saving” clause. This error is perhaps most clearly demonstrated by the district court’s quite misplaced reliance upon *Southern Pacific Company v. Jensen*, 244 U.S. 205 (1917), and *Knickerbocker Ice Company v. Stewart*, 253 U.S. 149 (1920). Those cases were concerned with injuries consummated on navigable waters rather than on land (the Court also noting in *Jensen* that the state remedy involved, workmen’s compensation, was wholly foreign to the common law and hence within the area of *exclusive* federal admiralty jurisdiction because it was beyond the scope of the “saving” clause. 244 U.S., *supra*, at 218). These cases are obviously not apropos to consideration of the validity of Florida’s “Oil Spill Prevention and Pollution Control Act of 1970”, which deals (a) primarily with injuries which would be consummated on land, and (b) with a remedy which is essentially of a common law nature (e.g., trespass on the case), falling well within the scope of the “saving” clause of 28 U.S.C.A. § 1333. As stated in *Panama Railroad Company v. Vasquez*, 271 U.S. 557, 561 (1926):

“an action *in personam* to recover damages for tort is one of the most familiar of the common law remedies. . . .”

If federal admiralty jurisdiction exists at all with respect to the injuries and damage towards which the Florida Act is directed, we think the wrongs that Act deals with clearly fall within the area of "concurrent jurisdiction" under the saving clause of 28 U.S.C.A. § 1333 rather than within an area of exclusive federal jurisdiction.

4. Whether a State may exercise its police powers to protect its property and the health and well being of its citizens through legislation affecting maritime matters if such legislation does not "conflict" with federal maritime law?

It has long been held that the grant of admiralty jurisdiction to the federal government under the Constitution and Judiciary Act does not preclude a state from exercising its police powers in its territorial waters in the absence of a conflict with federal maritime law. E.g., *Manchester v. Massachusetts*, 139 U.S. 240, 261 (1891); *C. J. Hendry Co. v. Moore*, 318 U.S. 133 (1943). In the somewhat related area of "interstate and foreign commerce, this Court long ago upheld the right of Louisiana to protect its citizens from yellow fever and cholera by subjecting all vessels approaching New Orleans to an inspection and the payment of an inspection fee, see, *Morgan's Steamship Company v. Louisiana Board of Health*, 118 U.S. 455 (1886), and more recently, in *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960), it was held that Detroit's Smoke Abatement Code could lawfully be applied to ships docked (on navigable waters) in the Port of Detroit.

The only extent to which federal admiralty jurisdiction limits the state's exercise of its legitimate police

powers to protect its fisheries, wildlife, property and the health of its citizens is that state regulation must not conflict with federal maritime law. See, e.g., *Red Cross Line v. Atlantic Fruit Company*, 264 U.S. 109, 125 (1924); *Manchester v. Massachusetts*, *supra*. As we will show in the following section of this brief, it is unlikely that any conflict exists between federal and state legislation in the present case, but even if certain conflicts were to be established there would still be no basis for invalidating Florida's Act in its entirety—the proper remedy in this situation being to hold simply that in any instance of conflict the federal law prevails.

5. Whether any “conflict” exists between Florida's “Oil Spill Prevention and Pollution Control Act of 1970” and federal maritime law, and if so, whether such conflict is of such nature and scope as would justify the invalidating of Florida's entire Act rather than only those points of actual conflict?

We recognize, of course, that state legislation affecting maritime matters, whether permissible because it is within the scope of the “saving” clause of 28 U.S.C.A. § 1333 or because it is a valid exercise of the legitimate police powers of the state, cannot be permitted to nullify or frustrate federal maritime law or defeat the essential features of federal admiralty jurisdiction. The test of the validity of state legislation in these “concurrent jurisdiction” and permissible “police power” areas is ordinarily that of the existence of *conflict* between state and federal law. See, e.g., *Red Cross Line v. Atlantic Fruit Company*, 264 U.S. 109, 125 (1924); *Manchester v. Massachusetts*, 139 U.S. 240, 261 (1891). As stated in *Just v. Chambers*, 312 U.S. 383, 388 (1941):

“With respect to maritime torts we have held that

the State may modify or supplement the maritime law by creating liability which a court of admiralty will recognize and enforce when the state action is not hostile to the characteristic features of the maritime law or inconsistent with federal legislation."

At the very start of this brief, we noted that the federal "Water Quality Improvement Act of 1970", 84 Stat. 91 (33 U.S.C.A. § 1161 et seq.), expressly contemplates parallel state action in the fight to prevent pollution injury to fish, wildlife, public health and public or private property as the result of oil spills, 33 U.S.C.A. § 1161(e), and expressly provides that it shall not be construed so as to preempt the right of a state to impose any other requirement or liability with respect to the discharge of oil into any waters within the State, or affect any state or local law not in conflict with the federal Act. We find considerable difficulty in seeing how state legislation such as Florida has enacted can be in conflict with a federal law when it does exactly that which the federal Act authorized it to do. Particularly is this so when it is clear under the cases just cited that "different" is not to be equated with "conflict", and that it is perfectly permissible for a state to add to or supplement the federal law. The court below attributed considerable importance to the fact that the measure of liability to the State and its citizens under the Florida Act is different from the measure of liability to the federal government under the federal Act. We agree that there is a "difference" but deny there is a "conflict". Why should the measure of liability to the state and federal government be the same? Is not the strong public policy of reducing pollution and oil spill damage advanced rather than injured by the existence of supplementary state remedies?

In any event, the existence of conflict on this or any other point can scarcely justify a holding that Florida's Act is unconstitutional in its entirety. We respectfully submit that any problem along this line can more appropriately be handled by conforming Florida's Act to the appropriate federal standards. Thus, in holding the Limitation of Liability Act, 46 U.S.C.A. § 183 et seq. available to limit a ship owner's liability for oil spill in navigable waters under Maryland's oil spill and pollution prevention act, a district court in that state found no difficulty in making the limitation defense available to a defendant without holding Maryland's legislation to be in any way "unconstitutional". See, *In Re Harbor Towing Corporation*, _____ F. Supp. _____, 3 Environment Reporter—Cases 1607 (D. Md. No. 70-20-N, decided Nov. 10, 1971); see also, *Richardson v. Harmon*, 222 U.S. 96 (1911) [applying the ship owner's liability limitation statute to a non-maritime tort action brought in the State courts].

CONCLUSION

This case vitally affects the ability of the coastal states to protect their beaches, marsh lands, coastal properties, non-navigable waters, and also the health and well being of their citizens, against the ravages of pollution emanating from oil spill and similar contaminating discharges upon their coastal waters. Drawn into issue are difficult and important questions relating to the constitutional and statutory limitations upon any shoreward march of federal admiralty jurisdiction and equally important issues concerning the extent to which state law is to be preempted or displaced if the march is to be permitted. We think these questions are of the utmost importance and

deserve plenary consideration by this honorable Court
with briefs on the merits and oral argument.

Respectfully submitted,

ARTHUR K. BOLTON
Attorney General

HAROLD N. HILL, JR.
Executive Assistant
Attorney General

ALFRED L. EVANS, JR.
Assistant Attorney General

PLEASE ADDRESS ALL
COMMUNICATIONS TO:

ALFRED L. EVANS, JR.
Assistant Attorney General
132 State Judicial Building
40 Capitol Square
Atlanta, Georgia 30334

Telephone (404) 656-3330

JAMES B. TALLEY
Assistant Attorney General

COURTNEY WILDER STANTON
Assistant Attorney General

FILE COPY

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1971

NO. 71-1082

Supreme Court, U. S.
FILED

APR 6 1972

MICHAEL RUDAK, JR., CLERK

REUBIN O'D. ASKEW, et al.,
Appellants,

-VS-

THE AMERICAN WATERWAYS
OPERATORS, INC., et al.,
Appellees.

On Appeal from the United States District Court
for the Middle District of Florida

~~MOTION FOR LEAVE TO FILE~~ AMICUS CURIAE and
BRIEF OF THE STATE OF NORTH CAROLINA
AMICUS CURIAE, IN SUPPORT OF THE
JURISDICTIONAL STATEMENT OF APPELLANTS

ROBERT MORGAN
Attorney General

Thomas E. Kane
Ocean Law Consultant

Christine Y. Denson
Assistant Attorney General
P. O. Box 629
Raleigh, North Carolina 27602

Telephone (919) 829-4618

FILE COPY

1945
1946
1947
1948
1949
1950
1951
1952
1953
1954
1955
1956
1957
1958
1959
1960
1961
1962
1963
1964
1965
1966
1967
1968
1969
1970
1971
1972
1973
1974
1975
1976
1977
1978
1979
1980
1981
1982
1983
1984
1985
1986
1987
1988
1989
1990
1991
1992
1993
1994
1995
1996
1997
1998
1999
2000
2001
2002
2003
2004
2005
2006
2007
2008
2009
2010
2011
2012
2013
2014
2015
2016
2017
2018
2019
2020
2021
2022
2023
2024
2025

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1971

NO. 71-1082

REUBIN O'D. ASKEW, et al.,
Appellants,

-VS-

THE AMERICAN WATERWAYS
OPERATORS, INC., et al.,
Appellees.

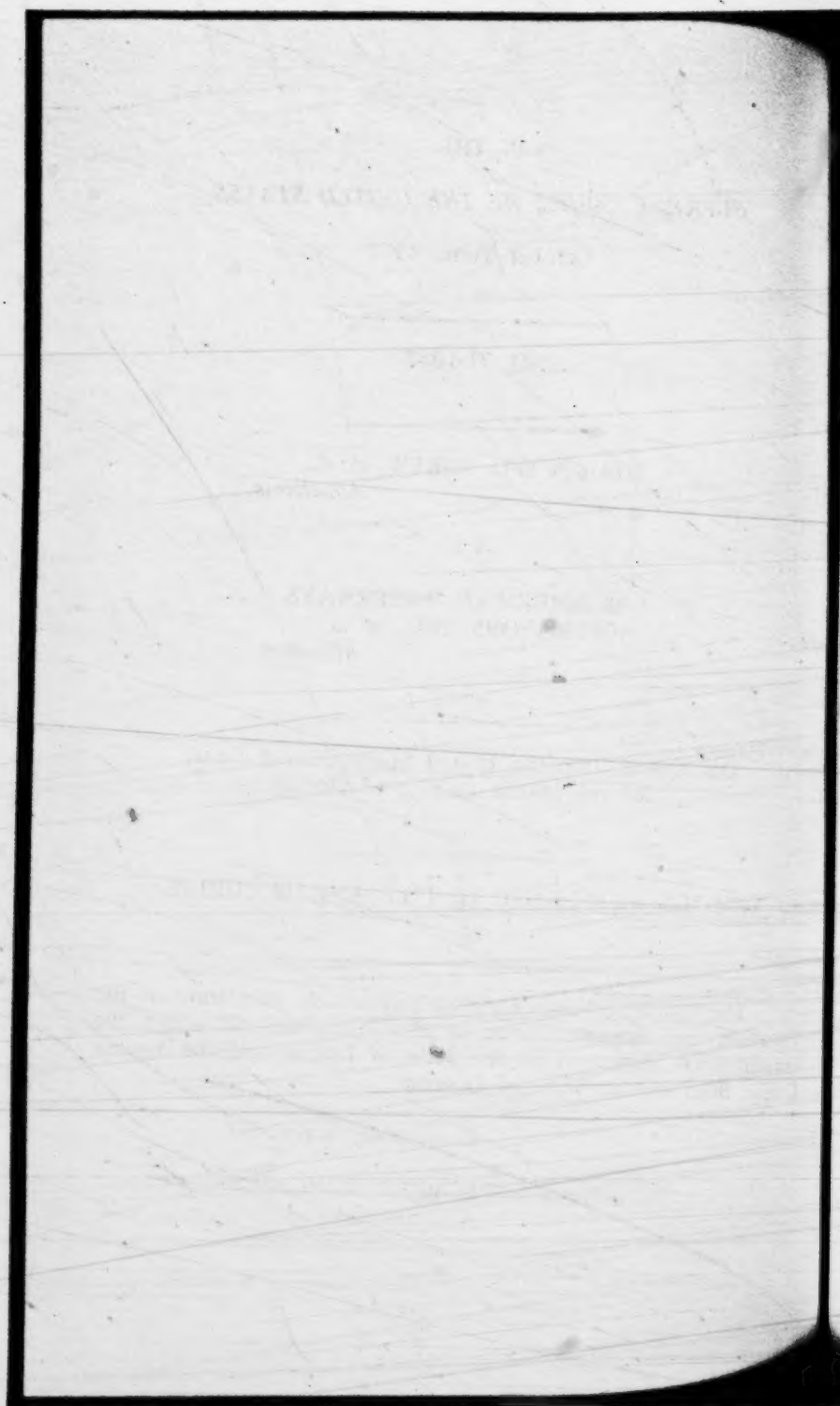
On Appeal from the United States District Court
for the Middle District of Florida

MOTION FOR LEAVE TO FILE AMICUS CURIAE

The State of North Carolina respectfully asks leave of the Court to file Amicus Curiae in this cause and to adopt the Jurisdictional Statement of the State of Florida and the Amicus Curiae Brief of the State of Georgia.

Respectfully submitted,

ROBERT MORGAN
Attorney General



BLEED THROUGH POOR COPY

Thomas E. Kane
Ocean Law Consultant

Christine Y. Denson
Assistant Attorney General
P. O. Box 629
Raleigh, North Carolina 27602

Telephone (919) 829-4618

1900-1901
1900-1901

1900-1901
1900-1901
1900-1901
1900-1901
1900-1901

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1971

NO. 71-1082

REUBIN O'D. ASKEW, et al.,
Appellants,

-VS-

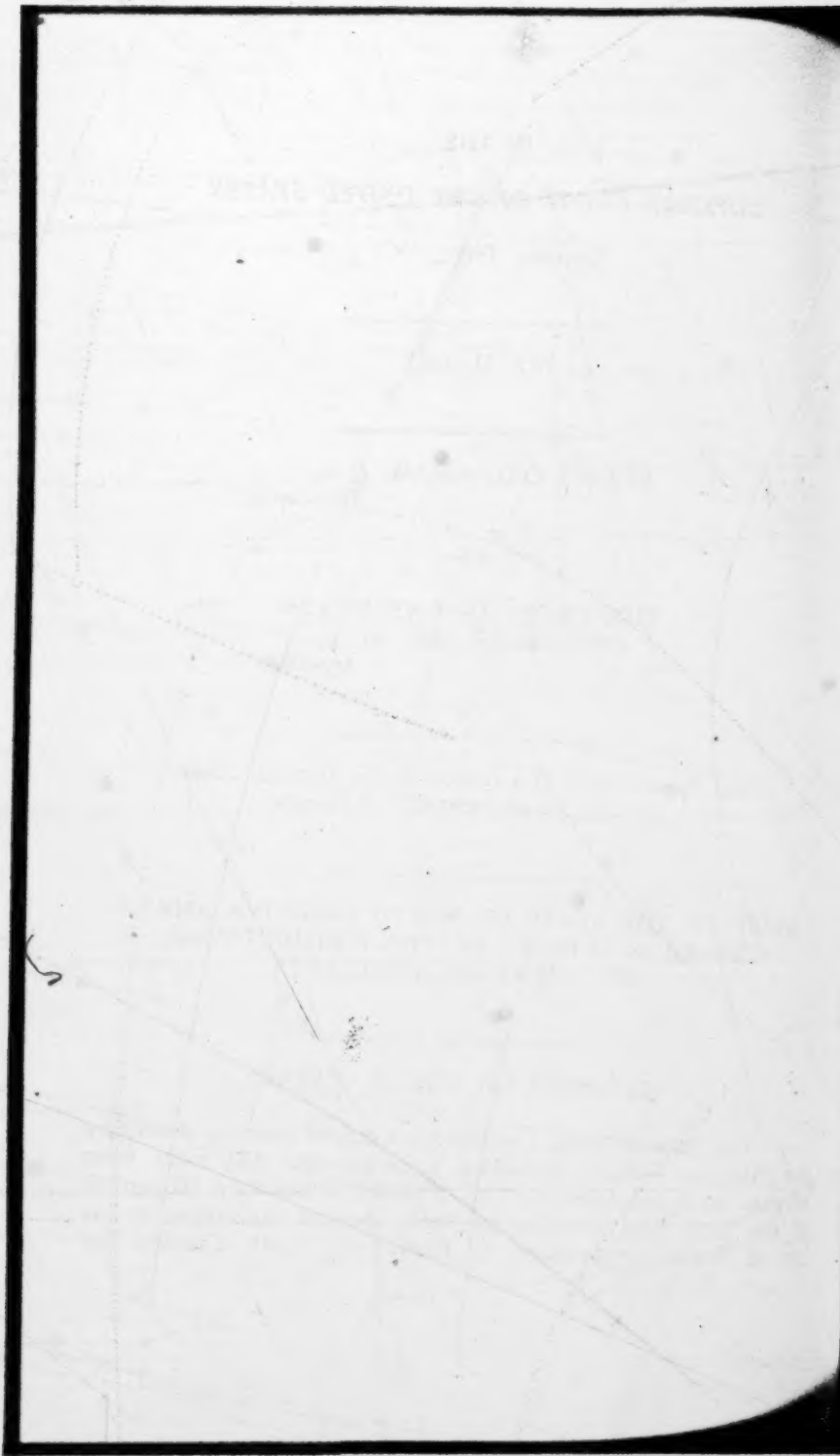
THE AMERICAN WATERWAYS
OPERATORS, INC., et al.,
Appellees.

On Appeal from the United States District Court
for the Middle District of Florida

BRIEF OF THE STATE OF NORTH CAROLINA AMICUS
CURIAE IN SUPPORT OF THE JURISDICTIONAL
STATEMENT OF APPELLANTS

INTEREST OF AMICUS CURIAE

The State of North Carolina has a general coastline (bordering the Atlantic Ocean) extending approximately 301 miles from Virginia to South Carolina. This, however, is less than 10 percent of the total tidal coastline in North Carolina. According to the United States Department of Commerce, North Carolina has



BLEED THROUGH POOR COPY

3,375 miles of tidal shoreline. This shoreline surrounds the many bays, sounds, and rivers of North Carolina and encompasses 2,200,000 acres of estuaries that are vital to marine organisms.

The United States Department of the Interior was directed by the Estuarine Areas Act of 1968 (16 U. S. C. §1221 *et seq.*) to study the nation's estuaries to evaluate, among other things, their value as ecosystems. One area studied was the Pamlico-Albemarle-Currituck Sound complex of North Carolina which takes in over 2,000,000 acres, or 90 percent, of North Carolina's estuaries. The report which resulted from that study estimated that:

"(A)bout 60 percent of all the United States' commercial finfish and shellfish and most marine sport fish inhabit estuaries during all or part of their life cycles. *This estuary is even more important to the North Carolina commercial fishery.* Estimates indicate that about 90 percent of the State's commercial finfish and shellfish harvest is dependent upon estuarine environments." *National Estuary Study*, U. S. Dept. of Interior, Vol. 3, App. B, pp. 112-144. (*Emphasis supplied.*)

The report further stated that this area (both land and water) studied was one of the largest relatively unspoiled natural areas on the eastern coast of the United States.

The two principal industries of eastern North Carolina are commercial fishing and recreation, which includes sport fishing, hunting, bathing, boating, and related activities. These activities all depend upon the favorable conditons of the North Carolina estuaries and the adjacent private and public lands, which in turn directly affects the economy of the State.

Thus North Carolina's interest in protecting its estuaries from deleterious substances is by no means slight. It is basic to the interests of the people it is charged to represent. The damage which can result from oil pollution could be disastrous to the commercial and sport fishing industries (not only because of its effects on the estuarine water itself, but also its effects on the marshlands, oyster

THESE ARE THE RESULTS OF THE RESEARCH (continued from page 1)

The first group of results shows that the majority of the subjects (75%) were able to identify the correct answer in the first trial. This was a significant finding as it indicates that the subjects had a good understanding of the material being tested.

A second group of results shows that the majority of the subjects (80%) were able to identify the correct answer in the second trial. This was also a significant finding as it indicates that the subjects had a good understanding of the material being tested.

These results are consistent with the findings of previous research, which has shown that subjects with a good understanding of the material being tested are able to identify the correct answer in the first trial.

The results of this research are consistent with the findings of previous research, which has shown that subjects with a good understanding of the material being tested are able to identify the correct answer in the first trial.

The results of this research are consistent with the findings of previous research, which has shown that subjects with a good understanding of the material being tested are able to identify the correct answer in the first trial.

beds and mud flats on which these fisheries so vitally depend) and to the recreational beaches of the State.

North Carolina, therefore, has considerable concern over the issues involved in this cause and believes that it has a legitimate interest in the substantial questions raised by the ruling of the three-judge panel of the United States District Court for the Middle District of Florida.

QUESTIONS PRESENTED ARE SUBSTANTIAL

The State of North Carolina adopts the questions presented, the facts material to their consideration and the grounds sustaining substantiality of the questions which are presented to the Court by the Jurisdictional Statement of the State of Florida and the supporting Amicus Curiae Brief of the State of Georgia.

CONCLUSION

The State of North Carolina prays the Court to take jurisdiction in this cause and give plenary consideration with briefs on the merits and oral arguments.

Respectfully submitted,

ROBERT MORGAN
Attorney General

Thomas E. Kane
Ocean Law Consultant

Christine Y. Denson
Assistant Attorney General
P. O. Box 629
Raleigh, North Carolina 27602

Telephone (919) 829-4618

PROOF OF SERVICE

I, Christine Y. Denson, hereby certify that on the _____ day of April, 1972, I served three copies of the above Motion for Leave to File Amicus Curiae and Amicus Curiae Brief in support of jurisdictional statement of appellants on the several parties hereto as follows:

Attorneys for Original Plaintiffs-Appellees
Ervin, Pennington, Varn & Jacobs
P. O. Box 1170
Tallahassee, Florida 32302

Attorneys for Intervening Plaintiffs-Appellees
Kurz, Toole, Taylor, Moseley & Gabel
Suite 1014
Barnett Bank Building
112 West Adam Street
Jacksonville, Florida 32202

Fowler, White, Gillen, Humkey,
Kinney & Boggs
P. O. Box 1438
Tampa, Florida 33601

Haight, Gardner, Poor & Havens
80 Broad Street
New York, New York 10004

Healy & Baillie
29 Broadway
New York, New York 10006

Attorney for Defendants-Appellants
Honorable Robert L. Shevin
Attorney General
The Capitol
Tallahassee, Florida 32304

PROOF OF SERVICE

I, Christine Y. Brown, hereby certify that on the
date of April 1971 I served this report of the above Motion for
the Attorney General and Attorney General that in support
of the Attorney General of expenses on the several parties hereto

Attorney for Christine Y. Brown
John F. Brown Van A. Brown
P. O. Box 1170
Tulsa, Oklahoma 74101

Attorney for Attorney General
John F. Brown Van A. Brown
P. O. Box 1170
Tulsa, Oklahoma 74101

Attorney for Attorney General
John F. Brown Van A. Brown
P. O. Box 1170
Tulsa, Oklahoma 74101

Attorney for Attorney General
John F. Brown Van A. Brown
P. O. Box 1170
Tulsa, Oklahoma 74101

Attorney for Attorney General
John F. Brown Van A. Brown
P. O. Box 1170
Tulsa, Oklahoma 74101

Attorney for Attorney General
John F. Brown Van A. Brown
P. O. Box 1170
Tulsa, Oklahoma 74101

Attorneys for Amicus Curiae

Honorable William J. Baxley
Attorney General
State Administration Building
Montgomery, Alabama 36104

Honorable Evelle J. Younger
Attorney General
600 State Building
Los Angeles, California 90012

Honorable Robert K. Killian
Attorney General
30 Trinity Street
Hartford, Connecticut

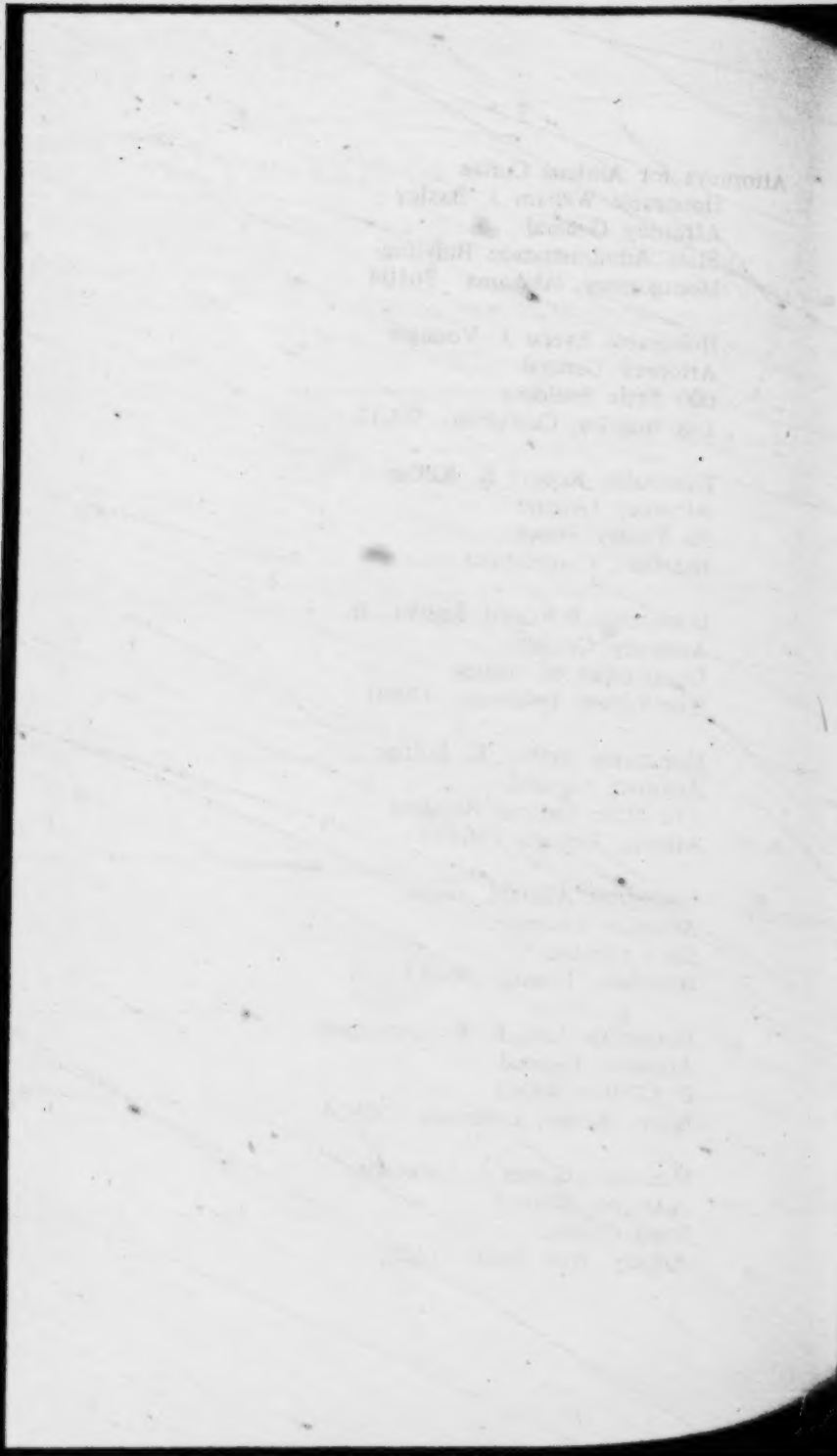
Honorable W. Laird Stabler, Jr.
Attorney General
Department of Justice
Wilmington, Delaware 19801

Honorable Arthur K. Bolton
Attorney General
132 State Judicial Building
Atlanta, Georgia 30334

Honorable Alan M. Goda
Attorney General
State Capitol
Honolulu, Hawaii 96813

Honorable Jack P. F. Gremillion
Attorney General
P. O. Box 44005
Baton Rouge, Louisiana 70804

Honorable Louis J. Lefkowitz
Attorney General
State Capitol
Albany, New York 12225



BLEED THROUGH POOR COPY

Honorable Lee Johnson
Attorney General
322 State Office Building
Salem, Oregon 97310

Honorable Andrew P. Miller
Attorney General
Supreme Court - Library Building Richmond, Virginia
23219

by first-class mail, prepaid, at the United States Post Office at
Raleigh, North Carolina.

Christine Y. Denson
Assistant Attorney General

FILE COPY

IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1082

REUBIN O'D ASKEW, et al.,

Supreme Court, U. S.
FILED

APR 8 1972

MICHAEL RODAK, JR., CLERK

Appellants,

vs.

THE AMERICAN WATERWAYS OPERATORS, INC., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE MIDDLE DISTRICT OF FLORIDA

**BRIEF OF THE ATTORNEY GENERAL OF THE STATE
OF NEW YORK AS AMICUS CURIAE IN SUPPORT
OF APPELLANTS' JURISDICTIONAL STATEMENT**

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for State of New York,
Amicus Curiae
80 Centre Street
New York, New York 10013
(212) 488-7567

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

PHILIP WEINBERG

JAMES P. CORCORAN

Assistant Attorneys General
of Counsel

BLEED THROUGH POOR COPY

TABLE OF CONTENTS

	PAGE
Interest of the <i>Amicus</i>	1
The Questions Presented Are Substantial	3
Conclusion	5

TABLE OF AUTHORITIES

<i>A. E. Nettleton Co. v. Diamond</i> , 264 N.E. 2d 118, 27 N.Y. 2d 182 (1970), app. diss. sub. nom. <i>Reptile Products Ass'n v. Diamond</i> , 401 U.S. 969	4
<i>Huron Portland Cement Co. v. City of Detroit</i> , 362 U.S. 440	3
<i>Knickerbocker Ice Company v. Stewart</i> , 253 U.S. 149	3
<i>Manchester v. Mass.</i> , 139 U.S. 240	3
<i>New York State Waterways Assn. v. Diamond</i> , — F. Supp. — (W.D.N.Y., Jan. 12, 1972)	4
<i>Palladio, Inc. v. Diamond</i> , 321 F. Supp. 630 (S.D.N.Y. 1970), aff'd 440 F. 2d 1319, cert. den. — U.S. — (Dec. 7, 1971)	4
<i>Skiriotes v. Florida</i> , 313 U.S. 69	3
<i>Southern Pacific Co. v. Jensen</i> , 244 U.S. 205	3

STATUTES

Laws of Florida, 1970, Chapter 70-244	2
New York Agriculture & Markets Law, § 358-a	4
New York Navigation Law § 33-c	5

	PAGE
New York Public Health Law, §§ 1221, 1250, 1251, 1252	1, 2
33 USC 1161	4
43 USC 1311	3
46 USC 183	4

APPENDIX

N.Y. Public Health Law § 1221. Prohibition against pollution of waters of marine district	6
--	---

IN THE
Supreme Court of the United States
OCTOBER TERM, 1971

No. 71-1082

REUBIN O'D ASKEW, et al.,

Appellants,

vs.

THE AMERICAN WATERWAYS OPERATORS, INC., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE MIDDLE DISTRICT OF FLORIDA

**BRIEF OF THE ATTORNEY GENERAL OF THE STATE
OF NEW YORK AS AMICUS CURIAE IN SUPPORT
OF APPELLANTS' JURISDICTIONAL STATEMENT**

Interest of the Amicus

The State of New York has long been a leader in the enactment of legislation designed to protect the health, safety, and welfare of its citizens from the harmful effects of pollution. Section 1221(2) of the New York Public Health Law prohibits the discharge of oils and other specified pollutants into the territorial waters of New York, and in §§ 1250, 1251 and 1252, civil and criminal penalties are imposed for such a

violation.* At present the State is considering passage of legislation which would impose absolute liability on those responsible for the discharge of oil into the territorial waters of the State. This proposed legislation has certain similarities with Chapter 70-244, Laws of Florida, 1970, the statute under consideration here.

Substantial damage has been done to the coastal waters of New York, in Long Island Sound and elsewhere, by the spillage of large quantities of oil from tankers and other sources. Future damage is likely to be even greater, especially if the federal government leases areas for oil drilling along the Atlantic seaboard on the Outer Continental Shelf. The devastating effects of such oil pollution have already been demonstrated in the Santa Barbara Channel and the Gulf of Mexico, and it is our position that the states, under the ample authority of their police powers, may prohibit oil pollution of the coastal waters within their territorial jurisdiction just as they prohibit the discharge of other hazardous and polluting substances into the state's air and waters.

Because of New York's vital concern with the preservation and protection of its waters, and in view of the State's interest in enacting legislation to impose strict liability on oil spills within New York's territorial waters, New York views the outcome of this litigation with deep interest. We are concerned with the effect that appellees' challenge to the Florida Act, if successful, might have on New York's efforts to protect its shoreline and coastal waters, and the environmental and economic interests represented therein, from one of the most harmful forms of pollution known to man—oil pollution. The decision in this litigation may therefore have a substantial effect on the health, safety, welfare, and legal rights of the citizens of New York State and our sister states.

* The full text of Public Health Law § 1221 is set forth as an Appendix to this brief.

The State of New York respectfully files this brief as *amicus curiae* in support of appellants' jurisdictional statement.

The Questions Presented Are Substantial

A.

The first substantial question is whether the admiralty and maritime jurisdiction of the federal government completely negates the right of the states to enact statutes to protect their territorial waters, and the natural resources therein, from irreparable damage caused by the discharge of oil into said waters. The federal Submerged Lands Act of 1953, 43 USC 1311, grants the states exclusive jurisdiction in the submerged lands from the shoreline to the three-mile limit. And traditionally the courts have recognized the right of states to legislate in protection of the fisheries upon which the coastal states so heavily depend. See, e.g., *Skiriotes v. Florida*, 313 U.S. 69 and *Manchester v. Massachusetts*, 139 U.S. 240. There can be no doubt that oil pollution of the states' coastal waters will have the most catastrophic effects on the fish and shellfish industries and therefore on the very health and welfare of our citizens, in addition to manifest detrimental impact on the economy of the states.

In the exercise of its police power, the states may act, in maritime and interstate commerce activities, concurrently with the federal government, except in fields preempted by Congress. See, e.g., *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, upholding Detroit's air pollution laws as constitutional when applied to ships, even though the ships are inspected and licensed by the federal government. The decision of the District Court undercuts this fundamental principle of constitutional law. The District Court's heavy reliance on *Southern Pacific Co. v. Jensen*, 244 U.S. 205, and *Knickerbocker Ice Company v. Stewart*, 253 U.S. 149, was particularly inappropriate since not

only are those decisions not authority for the District Court's determination, but their meaningfulness as precedents is open to serious question.

B.

The second substantial question presented is whether Congress has preempted this field so that the states are powerless to enact anti-pollution legislation of their own. The federal Water Quality Improvement Act of 1970, 33 USC §§ 1161 *et seq.*, far from preempting the field, actually invites the states to enact legislation to protect their own vital environmental and economic interests from the threat of oil pollution. For example, 33 USC § 1161(e) expressly provides that the federal statute shall not be construed to preempt the right of a state to impose any other requirement or liability with respect to the discharge of oil into the territorial waters of the state. The federal Limitation of Liability Act of 1851, 46 USC § 183, which restricted the liability of shipowners to the extent of their investment, does not prevent states from enacting liability statutes of their own, and there is nothing in the Limitation of Liability Act which states otherwise. This Court has consistently held that conflicts between federal and state statutes should not be sought out simply because the federal and state statutes are not identical. And the state's right to legislate on all subjects relating to the health, safety, and welfare of its citizens should not be restricted except by clear Congressional intent to do so. See, in this regard, *A. E. Nettleton Co. v. Diamond*, 264 N.E. 2d 118, 27 N.Y. 2d 182 (1970), *app. diss. sub. nom. Reptile Products Ass'n. v. Diamond*, 401 U.S. 969; and *Palladio, Inc. v. Diamond*, 321 F. Supp. 630 (S.D.N.Y. 1970), *aff'd* 440 F. 2d 1319, *cert. den.* — U.S. — (Dec. 7, 1971), where the courts upheld the constitutionality of the New York endangered species statute (Agriculture and Markets Law § 358-a) even though the state law was more stringent than the federal prohibitions. See too *N. Y. State Waterways Assn. v. Diamond*, — F. Supp. — (W.D.N.Y., BURKE, J., decided Jan. 12, 1972), sustaining New York's

Navigation Law § 33-c, which prohibits the discharge of sewage from vessels in the state's waters, against similar claims of federal preemption and interference with admiralty jurisdiction.

The District Court repeatedly begged the question whether the Florida statute was within the "admiralty jurisdiction" of the federal government. The act is in fact not limited to seagoing vessels at all but applies to oil discharges from onshore facilities, docks, drilling rigs, and barges and other vessels not within the federal admiralty jurisdiction. Here the state has plenary responsibility, consistently expressed by its Legislature, to protect its waters, harbors, wetlands and beaches from oil spills over and above whatever remedies may exist under federal law.

CONCLUSION

The decision of the District Court imposes the most serious legal restraints upon the states' right to legislate in the field of water pollution on behalf of their citizens, and this Court should note probable jurisdiction.

Dated: New York, New York, April 6, 1972.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for State of New York,
amicus curiae

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

PHILIP WEINBERG
JAMES P. CORCORAN

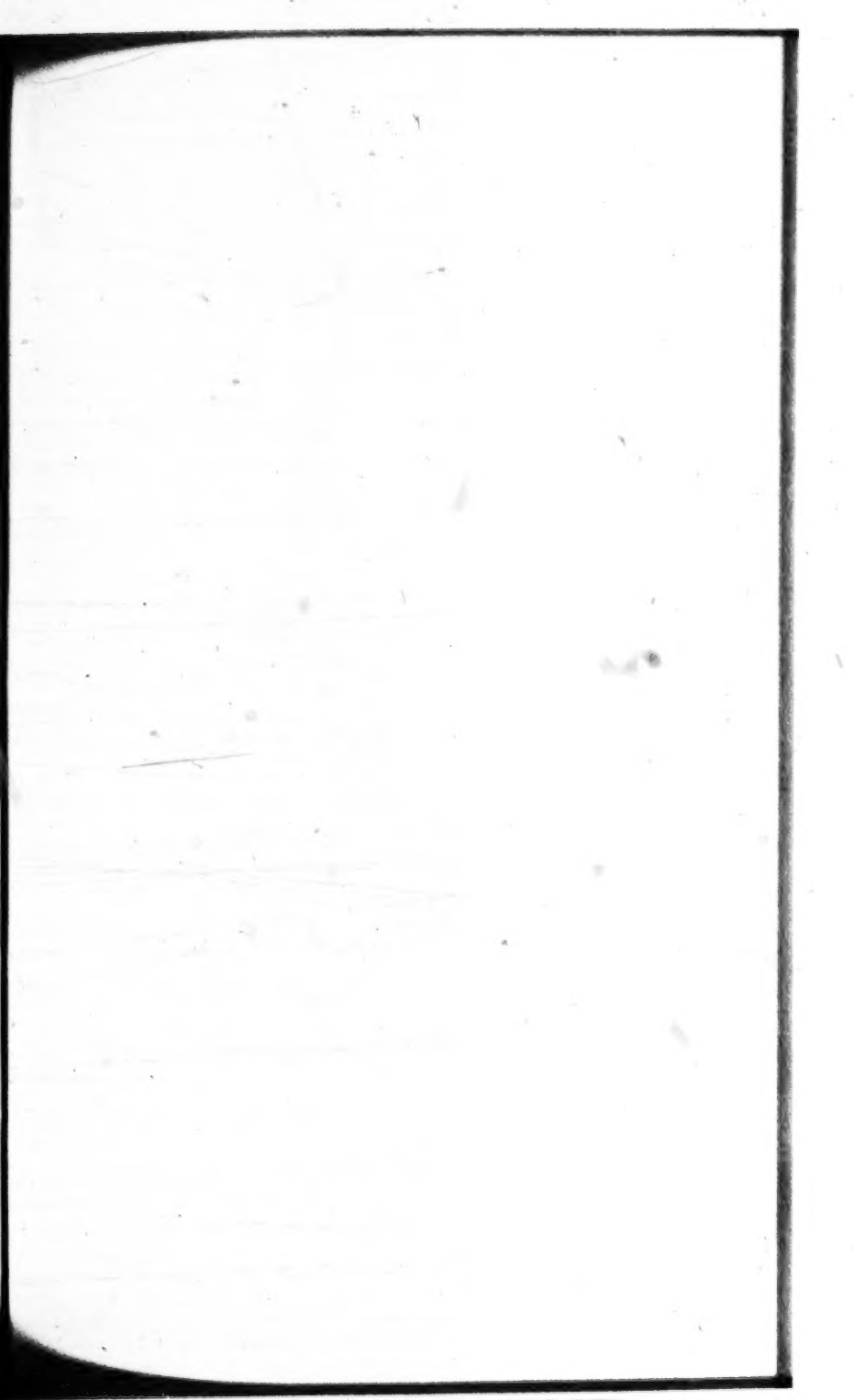
Assistant Attorneys General
of Counsel

APPENDIX**§ 1221. Prohibition against pollution of waters of marine district**

1. Sewage, industrial waste or other wastes, or any substance injurious to edible fish and shellfish, or the culture or propagation thereof, or which shall in any manner affect the flavor, color, odor or sanitary condition of such fish or shellfish so as to injuriously affect the sale thereof, or which shall cause any injury to the public and private shell fisheries of this state shall not be placed or allowed to run into the waters of the state in the marine district nor into any waters of Long Island, tributary to the marine district.

2. Garbage, cinders, ashes, oils, sludge or refuse of any kind shall not be thrown, dumped or permitted to run from any vessel or building, on land or water into the waters of the marine district.

L.1953, c.879; amended L.1961, c.490, § 5, eff. Jan. 1, 1962.



FILE COPY

IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1082

REUBIN O'D. ASKEW, et al

Supreme Court, U. S.
FILED

APR 10 1972

MICHAEL RODAK, JR., CLERK

Appellants

v.

THE AMERICAN WATERWAYS
OPERATORS, INC., et al

Appellees

On Appeal from The United States District Court
for the Middle District of Florida.

**BRIEF OF THE STATE OF CONNECTICUT AMICUS
CURIAE IN SUPPORT OF THE JURISDICTIONAL
STATEMENT OF APPELLANTS.**

STATE OF CONNECTICUT

ROBERT K. KILLIAN,
Attorney General

JAMES J. GRADY,
Assistant Attorney General

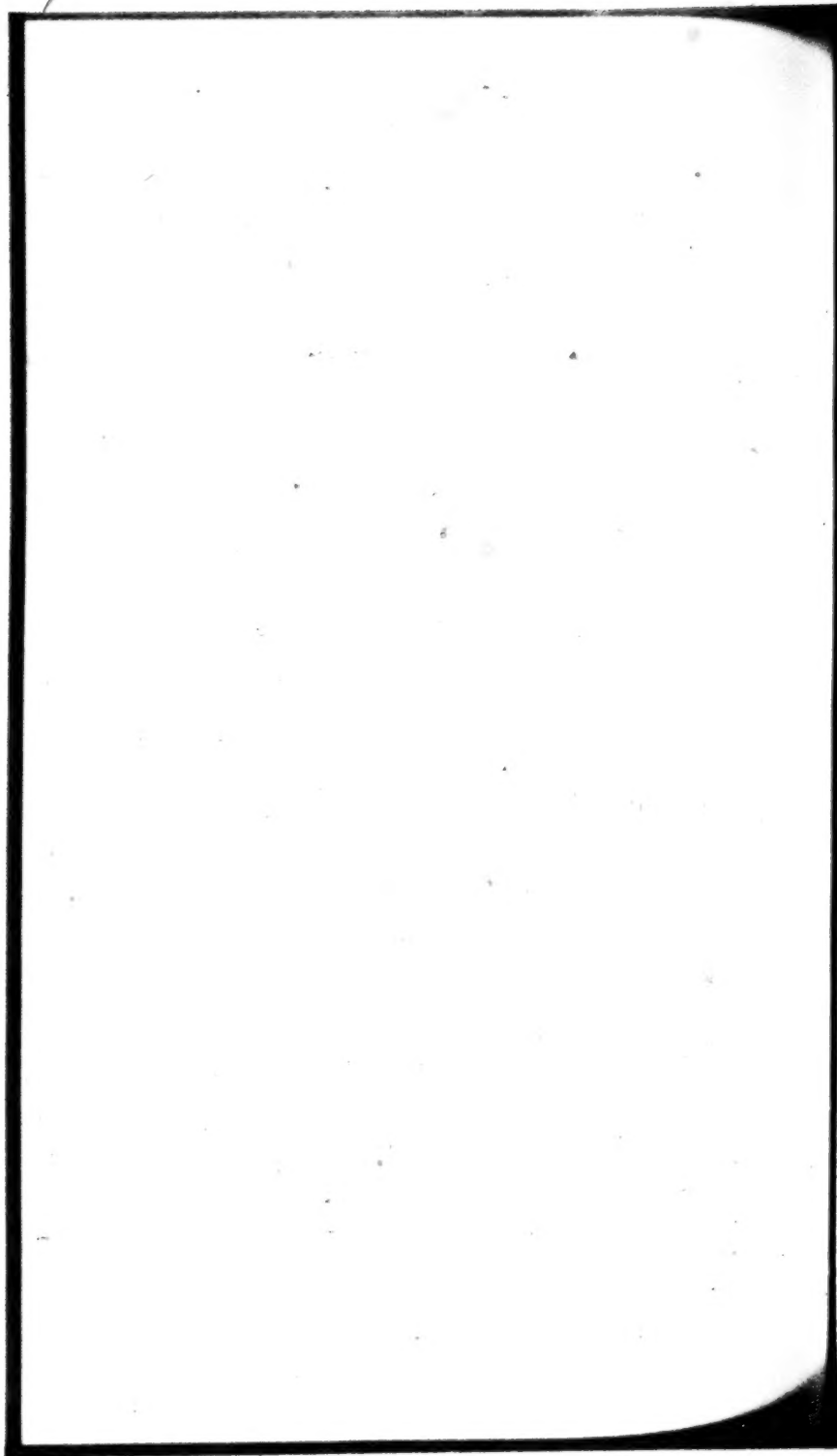
30 Trinity Street
Hartford, Connecticut

BLEED THROUGH POOR COPY

I N D E X

Page

Interest of amicus curiae	1
Statement of Position	3



BLEED THROUGH POOR COPY

IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1082

REUBIN O'D. ASKEW, et al

Appellants

v.

THE AMERICAN WATERWAYS
OPERATORS, INC., et al

Appellees

On Appeal from The United States District Court
for the Middle District of Florida.

BRIEF OF THE STATE OF CONNECTICUT AMICUS
CURIAE IN SUPPORT OF THE JURISDICTIONAL
STATEMENT OF APPELLANTS.

TO THE HONORABLE SUPREME COURT
OF THE UNITED STATES:

INTEREST OF AMICUS CURIAE

This Petition for a Writ of Certiorari poses the question of whether a state may enact a statute designed to protect it, its citizens and its environment from economic and ecological damage resulting from pollution of its territorial waters incident to an occurrence during the transport of oil or other substances by sea, or whether such a statute is unconstitutional in that it would be violative of Article III, Section 2,

Clause 3 of the United States Constitution; and whether the Congress may, by legislation, delegate to the states the right to enact legislation imposing absolute and unlimited liability upon owners or operators of vessels or terminal facilities which cause massive pollution of the state's territorial waters by oil or other substances.

This brief amicus curiae is filed pursuant to Rule 42 (4) of the Rules of the Supreme Court of the United States on behalf of the State of Connecticut, which has substantially similar pollution statutes as the State of Florida.

Our purpose in filing this amicus curiae brief is to directly support the State of Florida in its contention that a state statute designed to protect the state, its citizens and its environment from damage resulting from oil spills or other incidents at sea is not unconstitutional, and that the Congress has the power to delegate to the states the authority to enact legislation imposing absolute and unlimited liability on owners or operators of vessels or terminal facilities which cause pollution of the state's territorial waters by oil or other substances. Accordingly, we submit the constitutional issue is so substantial that in the opinion of the undersigned plenary consideration by this Court is required.

STATEMENT OF POSITION

For its reasons and conclusion, the State of Connecticut concurs in the reasons advanced by the State of Florida in its Petition and hereby adopts said reasons and conclusion as its own.

Respectfully submitted,

STATE OF CONNECTICUT

ROBERT K. KILLIAN,
Attorney General

JAMES J. GRADY,
Assistant Attorney General

30 Trinity Street
Hartford, Connecticut

FILE COPY

Supreme Court, U. S.
FILED

MAY 31 1972

MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1971

No. 71-1082

REUBIN O'D ASKEW, ET AL.,

Appellants,

v.

THE AMERICAN WATERWAYS
OPERATORS, INC., ET AL.,

Appellees.

On Appeal from the United States District Court
for the Middle District of Florida

BRIEF OF THE COMMONWEALTH OF VIRGINIA,
AMICUS CURIAE, ON BEHALF OF THE APPELLANTS

ANDREW P. MILLER
Attorney General

C. TABOR CRONK
Assistant Attorney General

Supreme Court Building
1101 East Broad Street
Richmond, Virginia 23219
*Counsel for the Commonwealth
of Virginia, Amicus Curiae*

Supreme Court of the United States

October Term, 1971

No. 71-1082

REUBIN O'D ASKEW, ET AL.,

Appellants,

v.

THE AMERICAN WATERWAYS
OPERATORS, INC., ET AL.,

Appellees.

On Appeal from the United States District Court
for the Middle District of Florida

BRIEF OF THE COMMONWEALTH OF VIRGINIA,
AMICUS CURIAE, ON BEHALF OF THE APPELLANTS

INTEREST OF THE COMMONWEALTH

Based on United States Coast and Geodetic Survey maps, the Commonwealth of Virginia estimates that it has at least 5,432 miles of shoreline along the Atlantic Ocean, the Chesapeake Bay and its tidal estuaries and rivers. Defining coastal wetlands as those areas between mean high water and mean low water and those areas in which certain

species of plants are characteristically found, the Virginia Institute of Marine Science has estimated that Virginia has some 392,955 acres of coastal wetlands of which some 176,766 acres are classified as marsh. Based on ultimate consumer prices, it has been estimated that each acre of marsh contributes \$525 yearly to the economy of the Commonwealth in the form of fin and shellfish. *Coastal Wetlands of Virginia Interim Report Summary and Recommendations*, Virginia Institute of Marine Science, pp. 2-3, 11 (1969). Obviously, this estimate represents but a fraction of the direct and indirect value of these wetlands to the Commonwealth and its people.

ARGUMENT

On April 10, 1972, the Governor of Virginia approved legislation authorizing the adoption of local wetland zoning ordinances to protect the wetlands from misuse. On the face of this legislation, the General Assembly of Virginia declared that:

"The Commonwealth of Virginia hereby recognizes the unique character of the wetlands, an irreplaceable natural resource which, in its natural state, is essential to the ecological systems of the tidal rivers, bays and estuaries of the Commonwealth. This resource is essential for the production of marine and inland wildlife, waterfowl, finfish, shellfish and flora; is valuable as a protective barrier against floods, tidal storms and erosion of the shores and soil within the Commonwealth; is important for the absorption of silt and of pollutants; and is important for recreational and aesthetic enjoyment of the people for the promotion of tourism, navigation and commerce.

"Continued destruction of Virginia's coastal wetlands will greatly contribute to the pollution of the

Commonwealth's rivers, bays and estuaries; will diminish the abundance of Virginia's marine and inland animals and waterfowl, finfish, shellfish and flora as sources of food, employment and recreation for the people of Virginia; will increase costs and hazards associated with floods and tidal storms; and will accelerate erosion and the loss of lands productive to the economy and the well-being of our citizens." Chapter 711, Acts of Assembly of 1972.

Virginia is fortunate in that it has thus far not suffered what could be termed a major oil spill in its coastal waters. Nevertheless, the General Assembly has recognized the potential for disaster on our shores from sea borne petroleum products as well as their gradual debasement by offal cast from vessels. Sections 62.1-44.34 and 62.1-195 of the Code of Virginia (1950), as amended, dealing with the discharge of petroleum products in Virginia waters are reproduced in an appendix hereto.

Having recognized the value of our shores, and whereas we have acted to secure them from destruction, we share the anxiety of the State of Georgia evidenced by its Brief Amicus Curiae in Support of the Appellants. Inasmuch as that Brief mirrors the position of the Commonwealth of Virginia in this matter, we fully adopt that Brief as that of the Commonwealth and urge the Court to reverse the judgment of the three-judge district court on the ground that the judgment of that court is not consonant with prior decisions of this Court and erroneously relies on federal legislation which is facially unconstitutional or is unconstitutional as applied.

CONCLUSION

The judgment of the three-judge district court is erroneous for the reasons advanced in the Brief of the State of Georgia, Amicus Curiae, in Support of the Appellants, fully adopted herein, and ought to be reversed.

Respectfully submitted,

ANDREW P. MILLER
Attorney General

C. TABOR CRONK
Assistant Attorney General

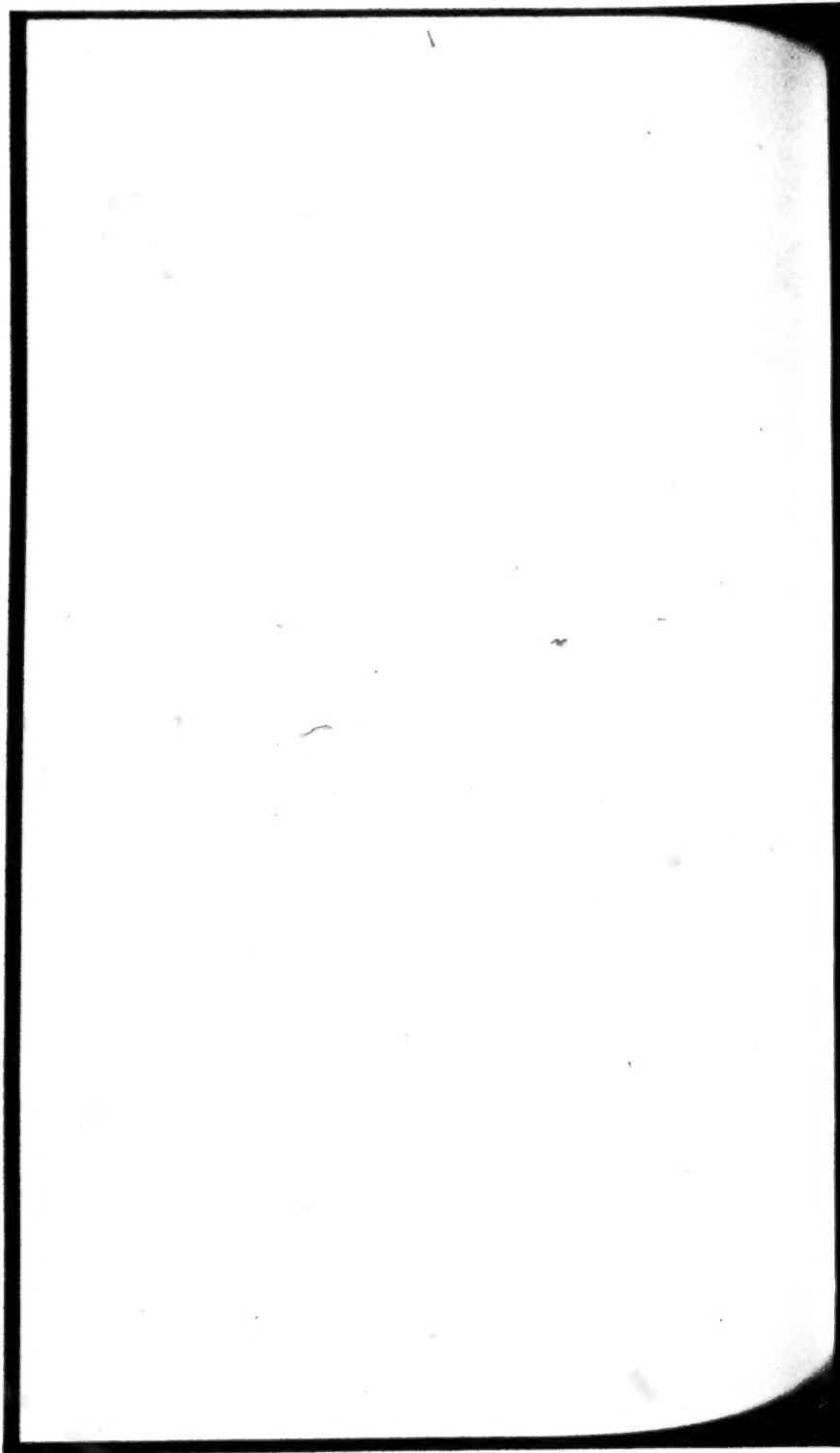
Supreme Court Building
1101 East Broad Street
Richmond, Virginia 23219
*Counsel for the Commonwealth
of Virginia, Amicus Curiae*

CERTIFICATE OF SERVICE

I, the undersigned member of the bar of this Court, certify that on the 30th day of May, 1972, I mailed by air-mail, postage prepaid, three copies of the foregoing Brief to Ervin, Pennington, Varn & Jacobs, Attorneys at Law, P. O. Box 1170, Tallahassee, Florida 32302; to Kurz, Toole, Taylor, Moseley & Gabel, Attorneys at Law, Suite 1014 Barnett Bank Building, 112 West Adam Street, Jacksonville, Florida 32202; to Fowler, White, Gillen, Humkey, Kinney & Boggs, Attorneys at Law, P. O. Box 1438, Tampa, Florida 33601; to Haight, Gardner, Poor & Havens, 80 Broad Street, New York, New York 10004; to Healy & Baillie, Attorneys at Law, 29 Broadway, New York, New York 10006, counsel for Appellees; and to the Honorable Robert L. Shevin, Attorney General of Florida,

Department of Legal Affairs, The Capitol, Tallahassee, Florida, counsel for Appellants. All parties required to be served have been served.

C. TABOR CRONK
Assistant Attorney General



BLEED THROUGH POOR COPY

§ 62.1-44.34. *Discharge of petroleum products into navigable waters prohibited; abatement of pollution.*—(1) No owner or operator of any vessel on the navigable waters of this State shall cause or permit the discharge of any petroleum product into such waters in an amount sufficient to cause damage to aquatic life therein or to the land or beaches adjacent thereto.

(2) The State Water Control Board may proceed against any person violating subsection (1) of this section as hereinabove provided in this chapter, and in addition may require such person to take such action as may be required to abate any pollution so caused.

(3) In the event any such discharge occurs, and it cannot be determined immediately what vessel or vessels were responsible therefor, the State Water Control Board may, with the consent of the Governor, take such action as is necessary to abate such pollution, including the engagement of contractors or other persons competent to eliminate the pollution. The cost of such abatement shall be collectible from the person causing or permitting such discharge, if his identity can be determined. If it is not possible to determine the identity of such person, the cost of the abatement of such pollution shall be paid from the general fund of the State treasury.

§ 62.1-195. *Discharge of oil in certain waters.*—(1) The following words, as used in this section, shall have the following meanings, unless the context otherwise requires:

- (a) "*Oil*" means any petroleum product or derivative.
- (b) "*Person*" means any individual association, firm or corporation.
- (c) "*Waters*" means navigable tidal waters.

App. 2

(d) "*Vessel*" means any boat, ship, barge, or other floating conveyance, however powered.

(2) Except in case of emergency imperiling life or property, or unavoidable accident, collision or stranding, and except as otherwise permitted by any lawful regulation, it shall be unlawful for any person to discharge, or suffer, or permit the discharge from any vessel of oil by any method, means or manner into, upon or under the navigable tidal waters of the State. Pursuant to such regulations which may be prescribed under federal laws or regulations, any lawful body of the State having jurisdiction of the ports of this State is authorized and empowered to regulate the discharge of oil from vessels in such quantities, under such conditions and at such times and places as in its opinion will not be deleterious to health or seafood, or a menace to navigation, or dangerous to persons or property engaged in commerce on such waters, and for the loading, handling and unloading of oil. Such body may cooperate with any agency of the federal government in the enforcement of this section.

(3) Any person who violates paragraph (2) or any regulation prescribed in pursuance thereof, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding two thousand five hundred dollars and not less than five hundred dollars, or by imprisonment not exceeding one year and not less than thirty days, or by both such fine and imprisonment, for each offense. And any vessel (other than one owned and operated by the State of Virginia or the United States) from which oil is discharged in violation of paragraph (2) or any regulation prescribed in pursuance thereof, shall be liable for the

App. 3

pecuniary penalty specified in this section and the penalty shall constitute a lien on such vessel.

The provisions of this section shall be deemed to supplement and not to replace the provisions of § 62.1-194.

(4) In addition to the foregoing penalties for the violation of this law, the vessel from which the oil is discharged shall be liable to the county or city in which the oil is discharged in violation of paragraph (2) for liquidated damages in the amount of one dollar per gallon of oil so discharged; provided, however that the total amount of liquidated damages shall not exceed the sum of fifteen thousand dollars for each violation. Such damages may be collected by an action in admiralty brought in an appropriate State or federal court by the attorney for the Commonwealth of such county or city for the benefit of such county or city in the name of the Commonwealth. Such sums as may be assessed against such vessel shall be paid into court or collected by the attorney for the Commonwealth and forwarded to the treasurer of the county or city entitled to such damages to be used for general county or city purposes.

Proof that oil was discharged from the vessel and a reasonable estimate of the amount so discharged shall make a prima facie case against the vessel and the burden shall be upon the vessel to establish that the discharge was permissible.

FILE COPY

Supreme Court, U. S.
FILED

MAY 31 1972

MICHAEL RODAK, JR., CLERK

**In the
Supreme Court of the United States**

No. 71-1082

**REUBIN O'D. ASKEW, ET AL.,
APPELLANTS,**

v.

**THE AMERICAN WATERWAYS OPERATORS, INC.,
ET AL.,
APPELLEES.**

**ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT
COURT FOR THE MIDDLE DISTRICT OF FLORIDA**

**BRIEF FOR THE COMMONWEALTH OF
MASSACHUSETTS, AMICUS CURIAE**

ROBERT H. QUINN
Attorney General
WALTER H. MAYO III
Assistant Attorney General
ROGER TIPPY
Assistant Attorney General
Boston, Massachusetts 02133
373 State House

TABLE OF CONTENTS

	Page
Interest of the <i>Amicus</i>	1
Argument	2
I. Congress May Allow the States to Enact Laws Affecting Maritime Commerce If Such Laws Do Not Conflict With General Admiralty Law	2
II. Congress Has Left Many Aspects of Oil Pollution Control Unaffected by Federal Law and, In Fact, Has Anticipated That State Action Would Supplement Federal Action	4
III. General Maritime Law Has A Limited Ap- plication To Oil Spill Control And Liabi- lity, Leaving Many Aspects To Action By The States	6
IV. The Application Of State Liability Rules To Oil Spills, Subject To Admiralty Prin- ciples Limiting Vessel Liability, Will Not Infringe Upon The Essential Uniformity Required For Maritime Commerce	9
Conclusion	12
Appendix	13

TABLE OF CITATIONS

Cases

<i>California v. The Bournemouth</i> , 307 F.Supp. 922 (C.D. Cal. 1969)	7
<i>Fireman's Fund Ins. Co. v. Standard Oil Co.</i> , 339 F.2d 148 (C.A. 9 1964)	7
<i>Gutierrez v. Waterman S.S. Corp.</i> , 373 U.S. 206	7

<i>The Harrisburg</i> , 119 U.S. 199	8, 9
<i>Knickerbocker Ice Co. v. Stewart</i> , 253 U.S. 149	2, 4
<i>Madruga v. Superior Court</i> , 346 U.S. 556	7
<i>Missouri Rates Cases</i> , 230 U.S. 474	10
<i>Moragne v. States Marine Lines, Inc.</i> , 398 U.S. 375 ..	8, 9
<i>Petition of New Jersey Barging Corp.</i> , 168 F.Supp. 925 (S.D.N.Y. 1958)	7
<i>Romero v. International Terminal Co.</i> , 358 U.S. 354 ...	3
<i>Rylands v. Fletcher</i> , L.R. 3 H.L. 330	8
<i>Salaky v. The Atlas Barge No. 3</i> , 208 F.2d 174 (C.A.2 1953)	7
<i>Standard Dredging Co. v. Murphy</i> , 319 U.S. 306 ...	3, 4, 5
<i>Wilburn Boat Co. v. Fireman's Fund Ins. Co.</i> , 348 U.S. 310	3, 4

Statutes

33 U.S.C. § 1161	4, 5, 9
46 U.S.C. §§ 181-189	10
46 U.S.C. § 740	7
Mass. G. L. c. 21 § 27(10)	1, 11
Mass. G. L. c. 21 §§ 50-52	1

Secondary Sources

Gilmore and Black, THE LAW OF ADMIRALTY (1957)	12
Healy and Paulsen, Marine Oil Pollution and the Water Quality Improvement Act of 1970, 1 J.MAR.LAW & COMM. 537 (1970)	6
McCoy, Oil Spill and Pollution Control, 40 GEO. WASH. L. REV. 97 (1971)	8
Morris, Hazardous Enterprises and Risk-Bearing Cap- acity, 61 YALE L.J. 1172 (1952)	12
United States Coast Guard, First Coast Guard Dis- trict, REGION I MULTI-AGENCY OIL & HAZAR- DOUS MATERIALS POLLUTION CONTIN- GENCY PLAN (COASTAL) (1972)	5

**In the
Supreme Court of the United States**

No. 71-1082

**REUBIN O'D. ASKEW, ET AL.,
APPELLANTS,**

v.

**THE AMERICAN WATERWAYS OPERATORS, INC.,
ET AL.,
APPELLEES.**

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT
COURT FOR THE MIDDLE DISTRICT OF FLORIDA

**BRIEF FOR THE COMMONWEALTH OF
MASSACHUSETTS, AMICUS CURIAE**

Interest of the Amicus

The Commonwealth of Massachusetts has enacted statutory provisions (M.G.L. c. 21, §§ 27(10), 50-52) for oil pollution control and liability which are similar to Florida's challenged statute in a number of significant respects. These include the authorization for a state agency to remove oil spilled on the Commonwealth's waters, liability

without fault to the Commonwealth for its costs incurred in removing oil, and liability without fault to the Commonwealth and to property owners for damages to public and private property resulting from oil spills. Massachusetts, like Florida, believes that federal law and federal programs do not constitute a comprehensive approach to the goal of protecting the coastal environment from oil spills. The gaps in federal law can be met by state action, and will be met by any coastal state which values its marine resources. If the decision of the district court is to stand, the constitutionality of Massachusetts' oil spill statute is in doubt. The Commonwealth is thus vitally interested in this case and urges, for the reasons hereinafter stated, that the judgment of the district court should be reversed.

Argument

I. CONGRESS MAY ALLOW THE STATES TO ENACT LAWS AFFECTING MARITIME COMMERCE IF SUCH LAWS DO NOT CONFLICT WITH GENERAL ADMIRALTY LAW.

Congress provided in the 1970 Water Quality Improvement Act (the Act) that nothing in that act was to be construed as preempting the states from setting their own liability rules for oil spills within their territorial waters. The court below held, however, that Florida's right to enact oil spill liability rules had been preempted by both the Constitution and Congressional action. Relying on *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, the court stated that Congress is powerless to delegate to the states any legislative authority within the admiralty jurisdiction. In *Knickerbocker*, this Court invalidated an act of Congress which would have allowed the application of state workmen's compensation laws to longshoremen injured in the course of maritime employment. The Court said then that

the Constitution took from the states all power to legislate individually in the maritime area and that Congress could not disrupt the Constitution's mandate for uniformity of maritime law by delegating its power to the states.

However, the requirement of uniformity was itself limited in *Standard Dredging Co. v. Murphy*, 319 U.S. 306 where the Court passed on the validity of collecting a state unemployment tax from employers of persons engaged in maritime work. The Court declined to apply the Jensen-Knickerbocker doctrine, reasoning as follows:

" 'Uniformity is required only when the essential features of an exclusive federal jurisdiction are involved.' Just v. Chambers, 312 U.S. 383, 292. When state compensation laws began to provide a remedy for maritime torts, it was at least arguable that the state remedy interfered with the existing admiralty system of relief through actions such as maintenance and cure No principle of admiralty requires uniform state taxation." 319 U.S. at 309.

Thus, the district court erred in concluding that any state action affecting maritime matters is barred by the admiralty clause of the Constitution. To claim, as the court below seemed to do, "that all enforced rights pertaining to matters maritime are rooted in federal law is a destructive over-simplification of the highly intricate interplay of the States and the National Government in their regulation of maritime commerce." *Romero v. International Terminal Co.*, 358 U.S. 354, 373.

We think that the proper analytical approach for examining state laws with a maritime impact was set out in *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 314. There, where Congress had not fashioned rules governing marine insurance contracts, and the states, by Con-

gress' consent or acquiescence, had created varying rules, the Court posed two questions: Is there a judicially-established Federal admiralty rule governing warranties in such contracts, and, if not, should the Court establish such a rule? The Court found no rule in existence and declined to fashion one, deeming the task an appropriate one for Congress if uniformity were desired. The Court observed that "[u]nder our present system of diverse state regulations, which is old as the Union, the insurance business has become one of the great enterprises of the Nation. Congress has been exceedingly cautious about disturbing this system, even as to marine insurance where congressional power is undoubted." 348 U.S. at 320-21.

It is obvious from *Standard Dredging and Wilburn Boat*, both *supra*, that this Court has retreated from its holding in *Knickerbocker Ice*, *supra*. There are areas of the law which affect maritime commerce but nevertheless are still subject to the legislative requirements of individual states, and we submit that the instant case involves one such area.

II. CONGRESS HAS LEFT MANY ASPECTS OF OIL POLLUTION CONTROL UNAFFECTED BY FEDERAL LAW AND, IN FACT, HAS ANTICIPATED THAT STATE ACTION WOULD SUPPLEMENT FEDERAL ACTION.

Section 1161(c)(2) of the Act requires a National Contingency Plan including an "assignment of duties and responsibilities among Federal departments and agencies in coordination with State and local agencies, including, but not limited to, water pollution control, conservation, and port authorities." The National Plan states that the specific commitments of state agencies and other non-Federal interests are to be set forth in regional contingency plans, National Oil and Hazardous Substances Pollution Contin-

gency Plan §203. A typical regional plan, the Region I Multi-Agency Oil & Hazardous Materials Pollution Contingency Plan (Coastal), prepared by the First Coast Guard District in Boston, provides in §203.1:

"The general policy to be followed is that the state and local governments will be expected to respond to spills considered by the RRT [Regional Response Team] to be within the capability of such groups. The Federal Government will respond in those situations considered by the RRT to be beyond the capability of such groups."

The "exclusive federal system" test of *Standard Dredging* is not met by the basic oil spill removal program. The district court's ruling has meaning only if the Act can be read as establishing uniform principles for the recovery of cleanup expenditures made by Federal, state or local authorities. However, the plain language of the statute does not sustain such a reading. 33 U.S.C. §1161 (f)(2), for example, establishes a terminal operator's liability "to the United States Government" and provides that the "United States may bring an action against the owner or operator of such facility in any court of competent jurisdiction to recover such costs." Section 1161(n) invests the district courts of the United States with jurisdiction over such actions. No provision of the Act gives state agencies access to the Federal courts to collect their cleanup expenses. Thus, the declaration of non-preemption in §1161(o)(2) must mean that state courts are to impose appropriate liabilities when state agencies remove spilled oil.

The International Convention on Civil Liability for Oil Pollution Damage, signed in Brussels in 1969 and await-

ing ratification by the United States Senate, would fill some, but not all, of the gaps in the Act.

"The most fundamental difference between the Convention and Section 11 [the section covering oil spills] is that the Convention relates not only to government claims for 'clean-up', but also to claims for other damages sustained by public and private interests as a result of oil pollution. . . . Only seagoing vessels and other seaborne craft (other than public vessels) actually carrying 'persistent' oil in bulk as cargo fall under the coverage of the Convention, whereas Section 11 applies to *all* vessels (with the exception of public vessels) using United States waters or waters of the contiguous zone, and to onshore and offshore facilities as well."

Healy and Paulsen, *Marine Oil Pollution and the Water Quality Improvement Act of 1970*. 1 J. Maritime Law & Comm. 537, 563 (1970).

Thus, at such time as the Convention becomes effective with respect to the United States, the liability rules for some vessels would be established as a uniform policy and state liability rules could not apply to those vessels. States could recover their cleanup costs and damages to natural resources under the Convention, but even then apart from the Act's limited scope there would be no codified liability principles for shippers, terminal facilities, vessels not covered by the Convention, or others causing oil spills.

III. GENERAL MARITIME LAW HAS A LIMITED APPLICATION TO OIL SPILL CONTROL AND LIABILITY, LEAVING MANY ASPECTS TO ACTION BY THE STATES.

General maritime law does not provide a broad remedy for oil spill damage. But this lack of a broad remedy is not reflected in the district court's statement that the Act "leaves undisturbed the remedies available under maritime

law for private injury caused by oil spillage or other pollution." 355 F.Supp. at 1247.¹ The court supported its statement by citation to several decisions in the Federal courts which "considered oil pollution as a maritime tort for which damages may be awarded," (*Ibid.*), but most of those cases were libels against a vessel: *Salaky v. The Atlas Barge No. 3*, 208 F.2d 174 (C.A. 2 1953); *California v. The Bournemouth*, 307 F.Supp. 922 (C.D. Cal. 1969); *Petition of New Jersey Barging Corp.*, (re *The barge Perth Amboy No. 1*), 168 F.Supp. 925 (S.D.N.Y. 1958). It is of course settled law that proceedings *in rem* against a vessel lie within admiralty's exclusive jurisdiction, *Madrugá v. Superior Court*, 346 U.S. 556, 560, and owners of shoreline property damaged by an oil spill are entitled to libel the offending barge or tanker in admiralty, notwithstanding that the damage or injury may have been consummated on land, 46 U.S.C. § 740. The maritime tort liability of a vessel found to be unseaworthy or negligently operated is not limited to injuries actually caused by the physical agency of the vessel, but may include injuries caused by the cargo after the cargo leaves the ship. *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206, 209.

None of the foregoing authorities cast any light on the existence of a supposed general theory of property damage liability for oil pollution in coastal waters. They indicate rather a partial policy for cases resulting from the spilling of oil by vessels, but are silent as to leakage or spillage of oil by terminal facilities, pipelines, motor vehicles, or any other means of containment.

One case cited by the court below was not a libel against a vessel: *Fireman's Fund Ins. Co. v. Standard Oil Co.*, 339 F.2d 148 (C.A. 9 1964). In that case the opinion indicates

¹ The Act states explicitly, in §1161(o) (1), that it leaves undisturbed property damage liability that may arise "under any provision of law."

that several yachts and their insurers filed an admiralty action *in personam* against the City of Los Angeles and others as owners or operators of what appears to have been a terminal facility for handling oil. The opinion indicates no challenge to the court's jurisdiction and no need to discuss alternative remedies which may have been available in the California State courts. It has been suggested that "where a traditional maritime interest is adversely affected and the injury is suffered on admiralty waters, admiralty jurisdiction exists regardless of whether the spill originated on land or water." McCoy, *Oil Spill and Pollution Control*, 40 Geo. Wash. L. Rev. 97, 102 (1971).

Thus the extent of substantive maritime law on liability for property damage caused by oil spills appears to be that vessels can be libeled only in an admiralty court and that owners of vessels can limit their liability *in personam* under the Limitation of Liability Act. No tenet of substantive maritime doctrine has been adduced which would bar a state from applying the rule of *Rylands v. Fletcher*, L.R. 3 H.L. 330, to a terminal facility operator or from applying the concept of enterprise liability to shippers who wish to import oil through the state's ports.

The district court disposed of the principle that "if the maritime law affords no remedy, the states may provide one" by citing this Court's recent opinion in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375. In the district court's interpretation, the *Moragne* decision "rejected the notion that the absence of a federal statute or a maritime rule on the subject compelled the conclusion that state law must govern." 355 F.Supp., at 1249. This extraordinary interpretation was derived from quite different facts and holdings. The subject in *Moragne* was recovery for wrongful death, on the basis of unseaworthiness, within territorial waters. There was a maritime rule on the subject: *The Harrisburg*, 119 U.S. 199, held there could be no recovery.

There was a Federal statute, the 1920 Death on the High Seas Act, which preserved state wrongful death remedies in territorial waters. "Congress," this Court said, "merely declined to disturb state remedies at a time when they appeared adequate to effectuate the substantive duties imposed by general maritime law," adding the observation that in 1920 state law "imposed a standard of behavior generally the same as—and in some respects more favorable than—that imposed by federal maritime law." 398 U.S., at 399. This Court in *Moragne* did not question the validity of Congress' delegation to the states in 1920: rather, it noted that the 1920 legislation was necessitated by the ruling in *The Harrisburg*, and then decided to overrule *The Harrisburg*.

In the light of the *Moragne* decision, we submit that Section 1161(o)(1) of the Act can be read as indicating the disposition of Congress to let state remedies for property damage from oil spills help to effectuate the substantive duty to prevent oil pollution in the marine environment. As to vessels carrying oil, state law imposes a standard of behavior generally the same as Federal law, although state law may be in some respects more favorable to the interests of environmental quality. As to terminal operators and shippers, the absence of an admiralty remedy coupled with the "savings-to-suitors" clause of Art. III may not compel the conclusion that state law must govern, but these considerations certainly permit the conclusion that state law may apply.

IV. THE APPLICATION OF STATE LIABILITY RULES TO OIL SPILLS, SUBJECT TO ADMIRALTY PRINCIPLES LIMITING VESSEL LIABILITY, WILL NOT INFRINGE ON THE ESSENTIAL UNIFORMITY REQUIRED FOR MARITIME COMMERCE.

Oil spill liability can attach to several different classes (terminal operators, vessels and their owners, oil shippers,

other parties who cause spills), in several different places (inland non-navigable waters, navigable rivers, territorial coastal waters, the high seas), and for several different kinds of damage (clean-up costs by various levels of government, clean-up by private parties, damage to public resources, and damage to private property). State rules on liability should be analyzed for the "who, where, and what" points of application before they are invalidated *in toto*. See *Missouri Rates Cases*, 230 U.S. 474.

It is unnecessary to discuss place and type of damage at length. The same law which a state clearly could enforce on its inland non-navigable waters but could not enforce on the high seas, it may or may not be able to enforce on navigable and coastal waters. The differences between clean-up costs and property damages are plain, and the district court distinguished these two elements of damage. But the decision below did not discuss the different classes subject to liability under the Florida statute; it concentrated on vessel liability and thus overstated the impact of Florida law on uniformity of admiralty law. We submit that potential defendants should be analyzed class by class.

(a) *Vessels and their owners*

Massachusetts does not challenge the Limitation of Liability Act (46 U.S.C. §§ 181-189) and concedes that a shipowner sued *in personam* for oil pollution damages could limit his liability under that Act. Beyond this, the Florida and Massachusetts statutes do not undermine or conflict with any principle known to require uniform nationwide application. The Water Quality Improvement Act allows four defenses to an action against a vessel for cleanup expenses, and the states do not explicitly allow the same defenses on the same terms. However, the principal purpose of the Act is to prevent oil spills, not to prevent the imposi-

tion of liability on vessels. This essential purpose is reinforced by both the Florida and Massachusetts statutes.

(b) *Terminal Facilities*

Business enterprises such as oil terminals which are located on the waterfront deal with maritime commerce on one side and shoreside commerce on the other. The operators must therefore deal with state and local governments with respect to many matters ranging from taxation and land use regulation to industrial safety standards. Just as states may strive to attract certain types of industries through tax concessions, special zoning provisions, and so forth, states have a concomitant power to discourage the location of some industries on terms incompatible with the state's interests. Such conditions do not interfere with a uniform admiralty law, since admiralty law does not purport to control the relationship between businessmen who happen to do business on the waterfront and their state and local governments and littoral neighbors. Certainly, no limit on liability similar to that given vessels exists for shorefront facilities at admiralty. Only in the Act's eight million dollar limitation on liability to the Federal government does any concept of limitation for terminal facilities' liability exist, and the Act's scheme is manifestly not an exclusive Federal one.

(c) *Shippers and owners of oil*

Although Florida law does not mention shippers, Massachusetts extends liability to "persons who owned or controlled the oil" spilled on waters of the Commonwealth. M.G.L. c. 21, §27(10). The owners of such oil will in many if not most cases be importing it to Massachusetts to sell within the Commonwealth. As they are held strictly accountable for oil spill costs, they can spread the cost of insuring against

such enterprise liability among the consumers. The market price of oil will consequently come closer to reflecting all costs, including social costs, of bringing oil to these consumers. See Morris, *Hazardous Enterprises and Risk-Bearing Capacity*, 61 Yale L.J. 1172 (1952).

Admiralty rules govern the liability of cargo to the vessel in various situations such as general average, and the rights of salvors in cargo are another subject of admiralty. See Gilmore and Black, *THE LAW OF ADMIRALTY*, chs. V, VIII (1957). But no rule bars enterprise liability for cargo. The economic effects of such liability would be felt locally on land rather than generally throughout the maritime community, and adoption of such laws thus becomes a political question for each coastal state. Massachusetts has decided that more pervasive security against oil spills is worth a slight increase in the price its citizens must pay for oil.

Conclusion

For the reasons stated herein, the Commonwealth of Massachusetts urges that the judgment of the district court should be reversed.

Respectfully submitted,

ROBERT H. QUINN

Attorney General

WALTER H. MAYO III

Assistant Attorney General

ROGER TIPPY

Assistant Attorney General

June 1972.

APPENDIX**MASSACHUSETTS GENERAL LAWS, CH. 21****§ 27. Duties and Responsibilities of Division; Oil Pollution of Waters.**

It shall be the duty and responsibility of the division to enhance the quality and value of water resources and to establish a program for the prevention, control, and abatement of water pollution. Said division shall:

. . .

(10) Undertake immediately, whenever there is spillage, seepage or other discharge of oil into any of the waters of the commonwealth or into any off-shore waters which may result in damage to the waters, shores or natural resources utilized or enjoyed by citizens of the commonwealth to cause said spillage, seepage or discharge to be contained and removed by whatever method it considers best. Chemicals shall not be used in the clean-up operation of oil spills unless their use has been authorized by the division, and if a public water supply or shellfish beds may be affected, by the department of public health.

In this clause, the word "oil" shall mean insoluble or partially soluble oils of any kind or origin or in any form including, but not limited to, crude or fuel oils, lube oil or sludge, asphalt, insoluble or partially insoluble derivatives of mineral, animal or vegetable oils.

The division shall determine the person responsible for causing such spillage, seepage or discharge and the names of all persons who owned or controlled the oil or who owned or controlled or leased the vessel, tank, pipe, hose or other container in which the oil was located when the spillage, seepage or discharge occurred. Said persons shall be jointly and severally liable to the commonwealth for all costs and expenses incurred by the division in making such investigation, and in containing and removing the oil, and shall be

jointly and severally liable to the commonwealth for all damages done to natural and recreational resources, including all costs of restoring damaged areas to their original condition, and to any other person for any damages to his real and personal property. The person responsible for causing such spillage, seepage or discharge shall be punished by a fine of not more than ten thousand dollars for each day such spillage, seepage or discharge continues, or by imprisonment for not more than two years or both.

Upon request of the director, the attorney general shall bring an action to recover all costs and expenses incurred for such investigation, containment, removal and restoration.

Such costs and expenses shall be recovered in an action of tort, and shall be credited to the account from which said sums of money had been advanced and may, subject to appropriation, be expended by the division for the purposes set forth in this clause. In any such action the commonwealth may also seek recovery for all loss and damage to the natural and recreational resources of the commonwealth.

Any owner or operator of a vessel, vehicle, railroad car or facility used for the production, processing, transportation, transfer or storage of oil shall, as soon as he has knowledge of any such spillage, seepage or discharge of oil into or adjacent to waters of the commonwealth, promptly notify the director of the division or his representative of such discharge. Any person who fails so to notify the director or his representative of such discharge shall be punished by a fine of not more than five thousand dollars.

Any person who removes oil, as defined in this clause, from the waters of the commonwealth or adjoining shorelines shall be entitled to reimbursement from any other person for the reasonable costs expended for such removal, if such oil resulted from the negligence of such other person. When such discharge results from the joint negligence

of two or more persons, each shall be liable to the others for his pro rata share of the costs of removal.

Any person who gratuitously renders assistance at the request of a duly authorized officer in removing oil from the waters of the commonwealth or adjoining shorelines shall not be held liable, notwithstanding any other provision of law, for civil damages as a result of any act or omission by him in removing such oil, except acts or omissions amounting to gross negligence or willful or wanton misconduct.

§ 50. Oil Pollution of Waters; Division May License Certain Terminals, Issue Regulations, Inspect Equipment, and Require Payment of Fees; Penalty for Operation of Terminal without License.

The division shall have the power to license all terminals in the commonwealth for the loading or discharge of petroleum products from vessels, and may issue reasonable rules and regulations in connection therewith for the purposes of protecting the public safety and for preventing the spilling of the liquids into the water of the commonwealth.

The division shall inspect periodically hoses, gaskets, tanks, pipelines and other equipment to make certain that they are in good operating condition, and may order the renewal of any of such equipment found unfit for further use.

The division may require by rules and regulations that suitable equipment be readily available to remove from the waters of the commonwealth any petroleum or chemical liquids spilled or discharged therein.

The division may require the payment of reasonable fees, designed to cover the costs incurred by the above inspections and its other duties.

Whoever operates such a terminal without a license from the division shall be punished by a fine of one hundred dollars per day during such period of unauthorized operation.

§ 50A. Oil Pollution of Waters; Terminal Operators to Provide Boom to Encircle Ships Discharging Oil, etc.; Authority of Director; Penalties.

Notwithstanding the provisions of section fifty, every owner or operator of an oil terminal or wharf shall employ a trained crew and have a plastic or wooden boom which is capable of encircling any ship or vessel depositing oil into tanks or other receptacles at such terminal or wharf, and which is designed to prevent seepage, overflow or excess oil from polluting or contaminating any lake, river, harbor, tidal water or flats. If the director finds that because of the negligence of such owner, operator or one of his agents or servants repeated seepage, overflow or excess oil has contaminated any lake, river, harbor, tidal waters or flats he shall require every such owner or operator to encircle every ship or vessel depositing oil at his wharf or terminal with such a boom. The authority granted to the director under the preceding sentence shall not be construed to diminish his powers to regulate and control oil spillage, including his power to require the use of booms, granted by section fifty. The owner or operator of any such wharf or terminal shall remove any oil held within such boom prior to a ship or vessel leaving the same. Whoever violates the provisions of this section shall be punished by a fine of not more than one thousand dollars. A license issued under section fifty to operate a terminal may be revoked for violation of any of the provisions of this section.

§ 50B. Bond to Be Furnished by Vessels Receiving or Discharging Petroleum Products; Forfeiture to Extent of Damage, Costs, Fines; Penalties for Operation Without Bond.

Any vessel, whether or not self-propelled, in or entering upon the waters of the Commonwealth for the purpose of discharging or receiving a cargo of any bulk petroleum product in the commonwealth shall post a bond with the

division of at least twenty-five thousand dollars payable to the commonwealth. Said bond shall be in a form approved by the division and may be obtained individually or jointly by the vessel, its owners or agent, its charterer, or by the owner or operator of the terminal at which the vessel discharges or receives said petroleum products. If the division determines that oil, as defined in clause (10) of section twenty-seven, has been discharged into the waters of the commonwealth from said vessel, the bond shall be forfeited to the extent of the costs incurred by the division in containing and removing said oil, to the extent of damage caused to the natural and recreational resources of the commonwealth, and to the extent of any otherwise uncollectable fines levied against the operators of said vessel for violation of any laws relating to water pollution abatement. The remedies provided in this section shall be in addition to all other remedies available. No bond shall be released without certification by the division that the vessel has not been a source of oil pollution. Other evidence of financial responsibility which is satisfactory to the division may be accepted by the division in lieu of bonding. Any vessel in the waters of the commonwealth for the purpose of discharging, or which receives, cargo of bulk petroleum products in the commonwealth without being bonded as provided in this section, or without having submitted other evidence of financial responsibility acceptable to the division, and the owner, agent and charterer of said vessel, and the operator of any terminal which receives or discharges such cargo from or to a vessel not so bonded, shall be punished by a fine of not more than five thousand dollars.

The superior court in equity shall have jurisdiction to enforce the provisions of this section.

§ 51. Same Subject; Division to Represent Commonwealth in Its Relations with Federal Government and with Cities,

Towns and Authorities, and May Enter into Certain Agreements and Contracts.

The division shall represent the commonwealth in its relations with the federal government and with cities, towns and authorities in all matters relating to oil pollution of the waters of the commonwealth or off-shore waters. It may enter into agreements with said agencies to coordinate supervisory activities and, subject to appropriation, to pay reasonable costs.

It may contract with public or private individuals, concerns or agencies for such protective and clean-up services as it may require.

§ 52. Same Subject; Collection and Disposal of Waste Oil Permit.

No one shall engage in the business of collecting waste oil or shall dispose of waste oil in any waters of the commonwealth, without a permit from the division. Said permit shall not be granted unless the division is satisfied that such disposition will not result in further pollution.

The division shall consult with and advise persons engaged or intending to engage in the business of disposing of waste oil as to the most appropriate and best method of disposal. It shall conduct a program of study and research and demonstration, relating to new and improved methods of waste disposal.

INDEX

	Page
OPINION BELOW	1
JURISDICTION	1
INTEREST OF THE STATE OF GEORGIA	2
QUESTIONS PRESENTED	4
STATEMENT	5
ARGUMENT	11

1. The district court's holding that Florida's legislative protection of its beaches, tide lands and other coastal properties from oil spill and similar pollution infringes upon "the exclusive federal admiralty domain", is in conflict with Supreme Court decisions that torts consummated on land are outside the scope of federal admiralty jurisdiction 11

2. The Admiralty Extension Act (46 U.S.C.A. § 740), which attempts to extend admiralty jurisdiction over torts shoreward so as to include injuries caused by a vessel on navigable waters "notwithstanding that such damage or injury be done or consummated on land", is facially violative of Article III, Section 2, Cl. 1 of the United States Constitution; it would be unconstitutional as applied to those torts towards which the Florida legislation is directed even if this were not so 16
 - (a) Facial Invalidity 16
 - (b) Invalidity as applied 19

INDEX—continued

Page

3. State legislation to protect beaches, marsh lands and non-navigable waters from injury due to oil spill and similar contaminating discharges on off-shore waters, if not wholly outside the constitutionally authorized scope of federal admiralty jurisdiction, is nonetheless permitted to the States by the "saving" clause of 28 U.S.C.A. § 1333 22
 4. A State may exercise its police powers to protect its property and the health and well being of its citizens through legislation affecting maritime matters so long as such legislation does not "conflict" with federal maritime law 25
 5. There is no "conflict" between Florida's "Oil Spill Prevention and Pollution Control Act of 1970" and federal maritime law, but even if such conflict existed it would not be of such nature and scope as to justify the invalidating of the entire Act rather than simply the points of actual conflict 26
- CONCLUSION 29

TABLE OF AUTHORITIES

Cases:

- C. J. Hendry Co. v. Moore*,
318 U.S. 133 (1943) 23, 25
- Cleveland Terminal and Valley Railroad
Company v. Cleveland Steamship Company*,
208 U.S. 316 (1908) 15

TABLE OF AUTHORITIES—continued

	Page
<i>Crowell v. Benson</i> , 285 U.S. 22 (1932)	17, 18
<i>Detroit Trust Co. v. The Thomas Barlum</i> , 293 U.S. 21 (1934)	12
<i>Ex Parte Phenix Insurance Co.</i> , 118 U.S. 610 (1886)	14, 15, 17, 20
<i>Grant Smith-Porter Ship Company v. Rohde</i> , 257 U.S. 469 (1922)	13
<i>Gutierrez v. Waterman Steamship Corp.</i> , 373 U.S. 206, 210 (1963)	21
<i>Huron Portland Cement Co. v. City of Detroit</i> , 362 U.S. 440 (1960)	25
<i>In Re Harbor Towing Corporation</i> , ____ F.Supp. _____, 3 Environment Reporter— Cases 1607 (D. Md. No. 70-20-N, decided Nov. 10, 1971)	28
<i>Insurance Company v. Dunham</i> , 11 Wall. (78 U.S.) 1 (1870)	13, 18
<i>Johnson v. Chicago and Pacific Elevator Company</i> , 119 U.S. 388 (1886)	14, 17
<i>Just v. Chambers</i> , 312 U.S. 383 (1941)	27
<i>Knapp, Stout & Co. v. McCaffrey</i> , 177 U.S. 638 (1900)	23
<i>Knickerbocker Ice Co. v. Stewart</i> , 253 U.S. 149 (1920)	24

TABLE OF AUTHORITIES—continued

	Page
<i>London Guarantee & Accident Company v. Industrial Accident Commission of California</i> , 279 U.S. 109 (1929)	13
<i>Manchester v. Massachusetts</i> , 139 U.S. 240 (1891)	25, 26, 27
<i>Morgan's Steamship Company v. Louisiana Board of Health</i> , 118 U.S. 455 (1886)	2, 25
<i>North Pacific Steamship Company v. Hall Brothers Marine Railway & Shipbuilding Company</i> , 249 U.S. 119 (1919)	13, 17
<i>Panama Railroad Company v. Johnson</i> , 264 U.S. 375 (1924)	18, 19
<i>Panama Railroad Company v. Vasquez</i> , 271 U.S. 557 (1926)	24
<i>Petition of New York Trap Rock Corporation</i> , 172 F.Supp. 638 (S.D.N.Y. 1959)	23
<i>Red Cross Line v. Atlantic Fruit Co.</i> , 264 U.S. 109 (1924)	23, 26, 27
<i>Revel v. American Export Lines, Inc.</i> , 162 F.Supp. 279 (E.D. Va. 1958)	23
<i>Richardson v. Harmon</i> , 222 U.S. 96 (1911)	28, 29
<i>Southern Pacific Company v. Jensen</i> , 244 U.S. 205 (1917)	24
<i>State Department of Fish and Game v. S. S. Bournemouth</i> , 307 F.Supp. 922 (C.D. Calif. 1969)	23

TABLE OF AUTHORITIES—continued

	Page
<i>State Industrial Commission of the State of New York v. Nordenholt Corporation,</i> 259 U.S. 263 (1922)	15
<i>The American Waterways Operators, Inc. v. Askew,</i> 335 F.Supp. 1241 (M.D. Fla. 1971)	1, 3, 10
<i>The Belfast,</i> 7 Wall. (74 U.S.) 624 (1868)	12
<i>The Blackheath,</i> 195 U.S. 361 (1904)	18
<i>The Propeller Genesee Chief v. Fitzhugh,</i> 12 How. (53 U.S.) 443 (1851)	12, 17
<i>The Lottawana,</i> 21 Wall. (88 U.S.) 558 (1874)	12, 19
<i>The Panoil,</i> 266 U.S. 433 (1925)	15
<i>The Plymouth,</i> 3 Wall. (70 U.S.) 20 (1865)	13, 14, 17, 20
<i>The Troy,</i> 208 U.S. 321 (1908)	15, 18
<i>United States v. Matson Navigation Co.,</i> 201 F.2d 610 (9th Cir. 1952)	20
<i>Victory Carriers v. Law,</i> 404 U.S., 30 L.Ed.2d 383 (1971)	13, 17
<i>Waring v. Clarke,</i> 5 How. (46 U.S.) 441 (1847)	13, 22
United States Constitution:	
Art. III, Sec. 2, Cl. 1	2, 4, 5, 9, 12, 16, 18, 21
U. S. Const., amend. VII	12

TABLE OF AUTHORITIES—continued

	Page
Federal Statutes:	
Judiciary Act of 1789, 1 Stat. 73	22, 23
28 U.S.C. § 1253	2
28 U.S.C.A. § 1333	5, 22, 23, 24, 25, 26
Water Quality Improvement Act of 1970, 84 Stat. 91 (33 U.S.C.A. § 1161)	6, 7, 8, 9, 10, 27
33 U.S.C.A. § 1162	7
Limitation of Liability Act, 46 U.S.C.A. § 183	28
Admiralty Extension Act, 46 U.S.C.A. § 740	4, 16, 19, 21, 23
State Statutes:	
Florida—Oil Spill Prevention and Pollution Control Act of 1970, Chapt. 70-244, Laws of Florida (Fla. Stat. Ann. Chapt. 376)	2, 3, 5, 8, 9, 10, 11, 19, 21, 24, 26
Maryland—Md. Code Ann. Art. 96A § 29 (1971 Cumulative Supplement)	8
Miscellaneous:	
Senate Report No. 1593, 80th Cong. 2d Sess., U.S. Code Cong. Svc. (1948), pp. 1898 et seq.	21, 23

**IN THE
Supreme Court of the United States**

October Term, 1971

No. 71-1082

REUBIN O'D. ASKEW, et al.,

Appellants,

-vs-

**THE AMERICAN WATERWAYS
OPERATORS, INC., et al.,**

Appellees.

**On Appeal from the United States District Court
for the Middle District of Florida**

**BRIEF FOR THE STATE OF GEORGIA
AS AMICUS CURIAE**

OPINION BELOW

The opinion of the district court is reported in *The American Waterways Operators, Inc. v. Askew*, 335 F.Supp. 1241 (M.D. Fla. 1971).

JURISDICTION

The judgment of the district court was entered on

December 10, 1971, and the notice of appeal was filed on December 23, 1971. The Court noted probable jurisdiction on April 17, 1972. 40 L.W. 3503. Jurisdiction rests upon 28 U.S.C. § 1253, this being an appeal from the judgment of a three-judge district court holding Florida's "Oil Spill Prevention and Pollution Control Act of 1970" to be invalid under Article III, Section 2, Cl. 1 of the United States Constitution.

INTEREST OF THE STATE OF GEORGIA

Almost ninety years ago this Court upheld the right of Louisiana to protect its citizens from yellow fever and cholera by subjecting all vessels approaching New Orleans to an inspection and the payment of an inspection fee. See *Morgan's Steamship Company v. Louisiana Board of Health*, 118 U.S. 455 (1886). While these scourges of the Nineteenth Century have been largely conquered, the same cannot be said of that great plague of the Twentieth Century—pollution—which now bids fair to imperil mankind's very existence.

Like Louisiana, Georgia is a coastal state. We think that Georgia's interest in protecting its citizens from the ravages of sea-borne pollution today is at least as great as was Louisiana's interest in protecting its citizens from the ravages of sea-borne yellow fever and cholera in 1886. The consequences of pollution in the form of oil spill or similar contaminating discharges upon the State's off-shore waters are not limited simply to the loss of tourists disinclined to bask on beaches whose sands ooze oil or similarly unattractive substances. Far more important than the risk of damage to the State's beaches (although Georgia's beaches are themselves quite worthy of protection) is the peril to the vast marsh lands and

non-navigable waters of the State which as spawning grounds are vital to aquatic and marine life and the industries dependent upon such life. The effect of pollution damage here might not be limited to the present generation. It could very well bear even more heavily upon the health and well being of many generations of Georgians who are as yet unborn.

It is scarcely surprising that the interest of Georgia in protecting its beaches, marsh lands and non-navigable waters from pollution emanating from oil spill or similar contaminating discharges upon its coastal waters gives rise to more than a little anxiety over the case at bar. A three-judge district court has held that Florida's "Oil Spill Prevention and Pollution Control Act of 1970", designed to protect that State's beaches, tidal flats, estuaries, and public lands adjoining the seacoast against oil spill and similar contamination, constitutes an "unlawful intrusion into the exclusive federal admiralty domain". *The American Waterways Operators, Inc. v. Askew*, 335 F.Supp. 1241, 1246 (M.D. Fla. 1971). Particularly in light of the fact that this Court has many times in the past noted that torts consummated on land or non-navigable waters are wholly beyond the limits of federal admiralty jurisdiction, the State of Georgia has an obvious interest in knowing not only whether federal admiralty jurisdiction is to be permitted to intrude (or even whether it is constitutionally able to intrude) into areas which in the past were indisputably within the State's jurisdiction, but whether this extension of federal jurisdiction, if it is indeed permissible at all, is to be of such magnitude as to wholly terminate any concurrent right of the State to protect its own property and the health and well being of its citizens from sea-borne pol-

lution—particularly where the expressly stated intent of Congress is that the states are *not* to lose this important right.

QUESTIONS PRESENTED

The ultimate question raised by the district court's decision in this case is whether the vesting of admiralty jurisdiction in the United States under Article III, Section 2, Cl. 1 of the Constitution is to be construed so as to prevent a state from taking legislative action to protect its beaches, marsh lands, coastal properties, non-navigable waters and the health and well being of its citizens against the ravages of pollution emanating from oil spill and similar contaminating discharges upon its coastal waters.

It is the view of the State of Georgia, however, that this ultimate question is really enmeshed in and dependent upon the answer to a number of vital questions relating to the constitutional and statutory limits of federal admiralty and maritime jurisdiction. We think these controlling questions, all of which seem to have been given scant attention by the court below, are as follows:

1. Whether the district court's holding that Florida's legislative protection of its beaches, tide lands and other coastal properties from oil spill and similar pollution infringes upon "the exclusive federal admiralty domain", is in conflict with Supreme Court decisions that torts consummated on land are outside the scope of federal admiralty jurisdiction?
2. Whether the Admiralty Extension Act (46 U.S.C.A. § 740), which attempts to extend ad-

miralty jurisdiction over torts shoreward so as to include injuries caused by a vessel on navigable waters "notwithstanding that such damage or injury be done or consummated on land", is facially violative of Article III, Section 2, Cl. 1 of the United States Constitution, or, if not, whether the Admiralty Extension Act would be unconstitutional as applied to those particular torts towards which the Florida legislation is primarily directed?

3. Whether state legislation to protect beaches, marsh lands and non-navigable waters from injury due to oil spill and similar contaminating discharges on off-shore waters, if not wholly outside the constitutionally authorized scope of federal admiralty jurisdiction, is nonetheless permitted to the States by the "saving" clause of 28 U.S.C.A. § 1333?
4. Whether a state may exercise its police powers to protect its property and the health and well being of its citizens through legislation affecting maritime matters if such legislation does not "conflict" with federal maritime law?
5. Whether any "conflict" exists between Florida's "Oil Spill Prevention and Pollution Control Act of 1970" and federal maritime law, and if so, whether the conflict is of such nature and scope as would justify the invalidating of Florida's entire Act rather than only those points of actual conflict?

STATEMENT

One of the most bothersome of man's growing ecological problems is the pollution which results from oil spills and similar contaminating discharges upon coastal

waters. Few forms of pollution are as readily visible to the naked eye and few have as great a potential for cataclysmic mischief. With public awareness having been jarred of late by several lamentable occurrences, the frightful effect of such pollution upon beaches, marsh lands and non-navigable coastal waters has begun to invoke legislative responses at various levels of government. Nationally, Congress has enacted the "Water Quality Improvement Act of 1970", 84 Stat. 91 (33 U.S.C.A. § 1161). This Act subjects the owner or operator of a vessel, onshore facility, or offshore facility to limited liability without fault for cleanup costs incurred by the federal government,¹ as well as to full liability for all federal cleanup costs where the oil spillage is shown to be the result of willful negligence or willful misconduct within the privity and knowledge of the owner. 33 U.S.C.A. § 1161(f). These costs constitute a maritime lien on the vessel, *ibid.*, and all vessels of over 300 tons which use navigable waters or any port or place in the United States are required to show evidence of financial responsibility to meet at least that liability to the United States to which the vessel could be subjected in the absence of fault or willful misconduct. 33 U.S.C.A. § 1161(p). The President of the United States is directed to establish regulatory procedures for the removal of oil spills and to promulgate preventive equipment requirements for vessels, onshore facilities and offshore facilities. 33 U.S.C.A. § 1161(j). Although the federal act presently deals solely with oil spills, it does contemplate

¹In the absence of fault, the owner or operator of a vessel is liable in an amount not to exceed the lesser of \$14,000,000 or \$100 per gross ton of the vessel if he is unable to prove that the occurrence was the result of certain excepted causes (e.g., an act of God, an act of war, negligence by the United States or the acts of a third party). 33 U.S.C.A. § 1161(f)(1).

future congressional action with respect to hazardous substances other than oil—based upon recommendations the President is directed to make to Congress. 33 U.S.C.A. § 1162(a)(g).

It is important to note, however, that the federal legislation speaks only of suits by the federal government to recover *its* (i.e., the federal government's) cleanup costs, 33 U.S.C.A. § 1161(f), or to enforce compliance. 33 U.S.C.A. § 1161(j)(2). Possibly for this reason, or perhaps as an expression of public policy favoring the existence of as many concurrent actions and remedies as possible to fight oil spill pollution, the federal legislation clearly contemplates parallel action by state and local governments. In giving the President power to institute suits to abate threats, 33 U.S.C.A. § 1161(e) declares:

"In addition to any other action taken by a State or local government, when the President determines there is an imminent and substantial threat to the public health or welfare of the United States, including, but not limited to, fish, shellfish, and wild life and public and private property, shorelines, and beaches within the United States, because of actual or threatened discharge of oil into or upon the navigable waters of the United States from an onshore or offshore facility, the President may require the United States attorney of the district in which the threat occurs to secure such relief as may be necessary to abate such threat, and the district courts of the United States shall have jurisdiction to grant such relief as the public interest and the equities of the case may require." (Emphasis added.)

And any doubt as to the fact that Congress had no intention whatsoever of precluding the states from enacting parallel legislation to protect *their* property as

well as the property, health and well being of their citizens is swept away by 33 U.S.C.A. § 1161(o), which provides:

"(1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency under any provision of law for damages to any publicly-owned property resulting from a discharge of any oil or from the removal of any such oil.

(2) Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil into any waters within such State.

(3) Nothing in this section shall be construed as affecting or modifying any other existing authority of any Federal department, agency, or instrumentality, relative to onshore or offshore facilities under this chapter or any other provision of law, or to affect any State or local law not in conflict with this section."

Florida² accepted the congressional invitation to legislate and enacted its "Oil Spill Prevention and Pollution Control Act of 1970", Chapter 70-244, Laws of Florida; Fla. Stat. Ann. Chapt. 376. The Florida Act parallels the federal legislation by prohibiting the discharge of oil (Florida, however, also prohibiting the discharge of any other pollutant) upon its coastal waters, estuaries, beaches, tidal flats, and lands adjoining the seacoast. Fla. Stat. Ann. § 376.041. Similar to the federal legislation it re-

²Maryland also appears to have enacted oil spill and anti-pollution legislation subsequent to enactment of the federal "Water Quality Improvement Act of 1970". See, Md. Code Ann. Art. 96A § 29 (1971 Cumulative Supplement).

quires vessels transporting pollutants within State waters to carry such containment gear as may be specified by regulations of the State Department of Natural Resources, Fla. Stat. Ann. § 376.07. And Florida too requires the owner of a vessel to show evidence of financial responsibility (although here the State legislation is broader than the federal in that it applies to all vessels rather than only those exceeding 300 gross tons). Compare Fla. Stat. Ann. § 376.14 with 33 U.S.C.A. § 1161(p). Perhaps the most significant difference between the two anti-pollution acts is the greater measure of liability which Florida imposes upon the polluter. While liability without fault to the United States for its cleanup costs is limited to \$100 per gross ton of the vessel or \$14,000,000 (whichever is lesser), see 33 U.S.C.A. § 1161(f), the Florida Act provides for full liability for *all* cleanup costs and all other damages incurred by the State, as well as for all damages resulting from injury to others. Fla. Stat. Ann. § 376.12.

The case at bar was initiated on March 9, 1971, by a number of merchant shippers and shipping associations. Their complaint, filed in the United States District Court for the Middle District of Florida, Jacksonville Division, contended that Florida's "Oil Spill Prevention and Pollution Control Act of 1970" was unconstitutional among other reasons because it sought to legislate substantive maritime law, which under the Constitution was said to repose exclusively within the federal domain. A three-judge district court was convened and on December 10, 1971, that court held the Florida legislation to be void *in toto* under Article III, Section 2 of the United States Constitution. While noting differences in the treatment of oil spill pollution under the federal "Water Quality

Improvement Act of 1970" and Florida's parallel legislation, the district court in fact did not base its decision upon the theory of a "conflict" between provisions of the two acts. It instead considered existing differences to be evidence that Florida's legislation involved a subject matter beyond its competency to deal with. See, *The American Waterways Operators, Inc. v. Askew*, 335 F.Supp. 1241, 1245-1246 (M.D. Fla. 1971). The decision was squarely predicted, in other words, upon the theory that "the Florida Act constitutes unlawful intrusion into the exclusive federal admiralty domain". 335 F.Supp. at p. 1246. Concerning the federal Water Quality Improvement Act's express contemplation of parallel State action in 33 U.S.C.A. § 1161(o), the district court said simply that "Congress is powerless to confer upon the states authority to legislate within the admiralty jurisdiction", and that it would not presume that 33 U.S.C.A. § 1161(o) was an attempt to do so. 335 F.Supp. at p. 1249. It "construed" the Congressional intendment of the provision to mean nothing more than that states were free to enforce pollution control measures within their constitutional prerogative. With the greatest respect for the court below we believe that examination of the past decisions of this Court will show not only that Florida's "Oil Spill Prevention and Pollution Control Act of 1970" does *not* constitute an unlawful intrusion into the exclusive federal admiralty domain, but that it is rather the district court's expansion of the scope of the *exclusive* federal admiralty domain which unlawfully intrudes upon Florida's right to protect its own lands and the physical, economic and social well being of its citizens.

ARGUMENT

1. The district court's holding that Florida's legislative protection of its beaches, tide lands and other coastal properties from oil spill and similar pollution infringes upon "the exclusive federal admiralty domain", is in conflict with Supreme Court decisions that torts consummated on land are outside the scope of federal admiralty jurisdiction.

The often catastrophic result of oil spill and similar contaminating discharges from ships and watercraft lies not in their being dropped on navigable waters but in their reaching the shore. It is here, on the beaches, marshes and non-navigable waters of a state that the chief damage is done, and it is to this injury, consummated on land and non-navigable waters, that Florida's "Oil Spill Prevention and Pollution Control Act of 1970" is chiefly directed. The district court nonetheless held that this attempt of a state to protect its own property as well as the health and well being of its citizens was impermissible because the subject matter falls within the *exclusive* federal admiralty jurisdiction.

We respectfully submit that in evaluating this conclusion, the more appropriate starting point is not the question of whether federal admiralty jurisdiction over the subject matter is "exclusive" rather than concurrent with state law jurisdiction, but is the very critical threshold question of whether in light of past Supreme Court decisions federal admiralty jurisdiction can be said to exist at all with respect to oil spill and similar contaminating discharges upon navigable waters where the principal injury complained of and legislated against is one which is consummated on land, marsh lands, or non-navigable waters of the state.

In considering this threshold question it might be well to note at the very outset that the fact that this Court has so frequently deliberated questions of federal admiralty jurisdiction in the past is undoubtedly attributable to the brevity and generality of the pertinent constitutional provision. Article III, Section 2, Cl. 1 provides simply that the judicial power of the United States shall extend, *inter alia*:

“ . . . to all Cases of admiralty and maritime jurisdiction;”

It did not take long for the Court to recognize that the absence of specificity as to the exact boundaries of “admiralty and maritime jurisdiction”, in a constitution whose authors included some of the most prominent of the colonial lawyers, could only mean that as in the case of the similarly undefined phrases “Suits at common law”³ and “Cases, in Law and Equity”,⁴ the Constitution presupposes the existence of a recognized body of law whose scope and jurisdictional limits were known and understood by the lawyers of the period. See, e.g., *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21, 43 (1934); *The Lottawana*, 21 Wall. (88 U.S.) 558, 574-575 (1874). Thus, it was early settled that in determining whether a particular transaction or occurrence is within the confines of admiralty jurisdiction, the proper inquiry is whether it was “within the scope of admiralty and maritime jurisdiction as known and understood in the United States when the Constitution was adopted”. See, *The Propeller Genesee Chief v. Fitzhugh*, 12 How. (53 U.S.) 443, 453 (1851). See also, *The Belfast*, 7 Wall. (74 U.S.) 624, 636 (1868).

³U. S. Const., amend. VII.

⁴U. S. Const., Art. III, Sec. 2, Cl. 1.

Proceeding in this manner, the Court found that the appropriate test with respect to contracts was one of "subject matter". If the contract related to maritime services, transactions or matters, it was within the constitutional reach of federal admiralty jurisdiction. E.g., *North Pacific Steamship Company v. Hall Brothers Marine Railway & Shipbuilding Company*, 249 U.S. 119, 125 (1919); *Insurance Company v. Dunham*, 11 Wall. (78 U.S.) 1, 26-29 (1870).

With respect to torts, however, it was concluded that a much narrower rule applied. Here the test was held to be one of "locality". And in a great number of decisions, the Court again and again pointed out that whether or not a tort falls within the constitutional perimeters of federal admiralty jurisdiction depends strictly upon whether or not it occurred on navigable waters. See, e.g., *Victory Carriers v. Law*, 404 U.S. _____, 30 L.Ed.2d 383, 387-389 (Dec. 13, 1971); *London Guarantee & Accident Company v. Industrial Accident Commission of California*, 279 U.S. 109, 123-124 (1929); *Grant Smith-Porter Ship Company v. Rohde*, 257 U.S. 469, 476 (1922); *North Pacific Steamship Company v. Hall Brothers Marine Railway & Shipbuilding Company*, 249 U.S. 119, 125 (1919); *Waring v. Clarke*, 5 How. (46 U.S.) 441, 463 (1847). Most important of all with respect to the case at hand, however, is the fact that this longstanding "locality" test itself turns not upon where the forces causing the injury were set in motion, but upon where the injury is consummated. In *The Plymouth*, 3 Wall. (70 U.S.) 20 (1865), a wharf and other shore structure were destroyed by a fire which had been negligently started on and spread from a vessel anchored on nearby navigable waters. The libel in admiralty filed by

the aggrieved owners was dismissed by the district court for want of jurisdiction. In affirming, this Court explained:

"This class of torts may well be referred to as illustrating the true meaning of the rule of locality in cases of marine torts, namely, that the wrong and injury complained of must have been committed wholly upon the high seas or navigable waters, or, at least, the substance and consummation of the same must have taken place upon those waters to be within the admiralty jurisdiction." (Ibid. at pp. 34-35.)

Some twenty years later, the Court was presented with virtually the same issue once again when shore structures were ignited by sparks from the smokestack of a passing steamer. Again, the Court reached the same conclusion. Following its earlier decision, the Court said in *Ex Parte Phenix Insurance Co.*, 118 U.S. 610, 618 (1886):

"Nothing is clearer than that, by the express adjudication of this court, the District Court, as a court of admiralty, would have no jurisdiction of a suit either *in rem* or *in personam*, by any one of the sufferers by the fire, to recover damages from the vessel or her owner."

The same thoughts were expressed in *Johnson v. Chicago and Pacific Elevator Company*, 119 U.S. 388, 397 (1886), where the Court concluded:

". . . it must be held that the cause of action in this case was not a maritime tort of which a District Court of the United States, as a court of admiralty, would have jurisdiction; and that the remedy belonged wholly to a court of common law; the substance and consummation of the wrong having taken place on land, and not on navigable water,

and the cause of action not having been complete on such water."

This conclusion as to the lack of federal admiralty jurisdiction where a tort initiated on navigable waters is consummated on land has been applied by the Court over the years in a number of varying factual situations. See, e.g., *The Panoil*, 266 U.S. 433 (1925) [vessel running into a dike]; *State Industrial Commission of the State of New York v. Nordenholt Corporation*, 259 U.S. 263 (1922) [longshoreman injured on a dock held to be injured on an extension of the land]; *The Troy*, 208 U.S. 321 (1908) [vessel running into a bridge]; *Cleveland Terminal and Valley Railroad Company v. Cleveland Steamship Company*, 208 U.S. 316, 319-320 (1908) [ship running into a bridge and a dock]. Under these decisions, we find it difficult to see how the law can be anything but settled that a tort which is consummated on land is beyond the reach of federal admiralty and maritime jurisdiction.

As we pointed out at the start of our discussion of this point, it is injury to Florida's beaches, marsh lands and other coastal properties to which its anti-pollution legislation is directed. Can there really be any difference if a ship-to-shore injury is borne by air (e.g., sparks) rather than by water (e.g., oil spill)? We think that to ask the question is to answer it and respectfully submit that the same legal principles which caused fire damage to shore structures ignited by sparks from the smoke-stack of a passing steamer to fall outside federal admiralty jurisdiction in *Ex Parte Phenix Insurance Co.*, 118 U.S. 610, 618 (1886), are equally applicable to injuries inflicted on beaches, marshes and non-navigable waters as the result of oil spill or similar contaminating

discharges from a passing vessel today. We think the district court erred in failing to apply the "locality" test in the instant case and in its consequent failure to hold that under the settled Supreme Court decisions referred to the Florida legislation is wholly beyond the scope of the admiralty and maritime jurisdiction conferred on the federal government by Article III, Section 2, Cl. 1 of the Constitution.

2. The Admiralty Extension Act (46 U.S.C.A. § 740), which attempts to extend admiralty jurisdiction over torts shoreward so as to include injuries caused by a vessel on navigable waters "notwithstanding that such damage or injury be done or consummated on land", is facially violative of Article III, Section 2, Cl. 1 of the United States Constitution; it would be unconstitutional as applied to those torts towards which the Florida legislation is directed even if this were not so.

(a) *Facial Invalidity.*

Notwithstanding the seemingly settled law on the constitutional limits of admiralty jurisdiction over torts,⁸ Congress, in 1948, passed an Act which with considerable candor it entitled "An Act for the Extension of Admiralty Jurisdiction". See, 62 Stat. 496, 46 U.S.C.A. § 740. The relevant portion of the Act declares:

"The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, *notwithstanding that such damage or injury be done or consummated on land.*" (Emphasis added.)

⁸See, pp. 11-16, *supra*.

In *Victory Carriers v. Law*, 404 U.S. ____, 30 L.Ed.2d 383, 387-390 (Dec. 13, 1971), this Court, after first discussing its long adherence to the "locality" test in connection with admiralty jurisdiction over torts, took note of this congressional attempt "to overrule or circumvent this line of cases", and noted further that the Act had "survived constitutional attack in the lower federal courts". The absence of indication as to whether or not it considered the three lower court decisions referred to to have been correctly decided would seem to indicate a tacit acknowledgment that the issue is at the very least, still open.

As we see it, careful analysis of this Court's past decisions leads to the inescapable conclusion that any attempt by Congress to extend federal admiralty jurisdiction shoreward so as to gather into its fold those torts which are consummated on land is unconstitutional on its face, with the three lower court opinions to the contrary being plainly erroneous. To start with, we think the decisions of this Court to which we have already referred, e.g., *The Plymouth*, 3 Wall. (70 U.S.) 20 (1865); *Ex Parte Phenix Insurance Co.*, 118 U.S. 610 (1886); *Johnson v. Chicago and Pacific Elevator Company*, 119 U.S. 388 (1886); and *North Pacific Steamship Company v. Hall Brothers Marine Railway & Shipbuilding Company*, 249 U.S. 119, 125 (1919), considered together and in light of such other decisions as *The Propeller Genesee Chief v. Fitzhugh*, 12 How. (53 U.S.) 443, 453 (1851), leave no doubt but that they were dealing with nothing less than the constitutional limits of admiralty jurisdiction over torts. Certainly this has always been the interpretation which this Court has itself placed upon these prior decisions. See, *Crowell v.*

Benson, 285 U.S. 22, 55 (1932); *The Troy*, 208 U.S. 321, 323 (1908); *The Blackheath*, 195 U.S. 361, 367 (1904). As stated in *Crowell v. Benson*, *supra*:

"In amending and revising the maritime law, the Congress cannot reach beyond the constitutional limits which are inherent in the admiralty and maritime jurisdiction. *Unless the injuries to which the Act relates occur upon the navigable waters of the United States, they fall outside that jurisdiction.* Not only is navigability itself a question of fact, as waters that are navigable in fact are navigable in law, but, where navigability is not in dispute, *the locality of the injury*, that is, whether it has occurred upon the navigable waters of the United States, *determines the existence of the congressional power to create the liability prescribed by the statute.*" (Emphasis added.)

Moreover, any possible contention that the earlier decisions were based upon the jurisdiction granted by Congress under the Judiciary Act rather than upon Article III, Section 2, Cl. 1 limitations is demolished by the fact that this Court has flatly stated that the legislative grant (i.e., prior to enactment of the Admiralty Extension Act) was already co-extensive with the constitutional grant. See, *Insurance Company v. Dunham*, 11 Wall. (78 U.S.) 1, 23 (1870). Obviously, water cannot be added to the flask which has already been filled.

If this Court's statement of the law in *Crowell v. Benson*, 285 U.S. 22, 55 (1932), is correct (and we think it clearly is correct), the Admiralty Extension Act cannot stand. The undoubtedly broad discretion of Congress to modify or supplement laws dealing with *substantive maritime rights* cannot be used to extend the jurisdictional limits of admiralty. See, *Panama Railroad Com-*

pany v. Johnson, 264 U.S. 375, 386 (1924). As stated in *The Lottawana*, 21 Wall. (88 U.S.) 558, 576 (1874):

"The question as to the true limits of maritime law and admiralty jurisdiction is undoubtedly, as Chief Justice Taney intimates, exclusively a judicial question, and no State law or act of Congress can make it broader, or (it may be added) narrower, than the judicial power may determine those limits to be."

Here the determination has long since been made. It follows that in the case at bar the district court's decision cannot be sustained upon the ground that the area upon which Florida is said to have transgressed is one which while manifestly beyond the scope of federal admiralty jurisdiction in the past, has nonetheless been added to the federal admiralty domain by virtue of the Admiralty Extension Act. Since that Act is unconstitutional, the decision of the district court is without foundation and ought to be reversed under the well settled decisions of this Court that it is "locality" (i.e., where the tort was consummated) which controls in questions of maritime tort jurisdiction.

(b) *Invalidity as applied.*

Even if the Admiralty Extension Act's attempt to extend federal admiralty jurisdiction (so as to include injuries consummated on land) were not unconstitutional on its face, it would not necessarily follow that the Act could constitutionally be applied to those particular wrongs towards which Florida's "Oil Spill Prevention and Pollution Control Act of 1970" is primarily directed (i.e., pollution damage to beaches, tidal flats, non-navigable waters and lands adjoining the seacoast). The only Court of Appeals decision we are aware of

which has upheld the Admiralty Extension Act's constitutionality did so upon the rationale that the particular tort before it (a vessel on navigable waters running into a dike) was indeed within the scope of admiralty jurisdiction as it was understood at the time the Constitution was adopted. See, *United States v. Matson Navigation Co.*, 201 F.2d 610 (9th Cir. 1953). While we think this conclusion is itself quite erroneous because it misreads or misunderstands the constitutional import of *The Plymouth*, *supra*; *Ex Parte Phenix Insurance Co.*, *supra*⁶, and the various other Supreme Court decisions we have discussed, it is also important to note that the only direct authority which the Court of Appeals was able to muster in support of its conclusion was a statute of Louis XIV of France which defined French admiralty jurisdiction to include "quais, dikes, jetties, palisades and other works erected against the violence of the sea. . . .", see 201 F.2d at 615 fn. 9. Even assuming for the sake of argument the correctness of the Court of Appeals rationale, conclusion and decision, would it

⁶At 201 F.2d 615 n.9, for example, the court of appeals cites *The Plymouth* as authority for its starting premise: "An essential to the jurisdiction of the admiralty courts is that it was committed in relation to navigable waters". (Emphasis added.) Obviously *The Plymouth* stands for no such thing. As we have already seen, *The Plymouth* rejects the application of this test of maritime contract jurisdiction (i.e., a subject matter touching and concerning, or made "in relation to" navigable waters or ships) and applies a strict "locality", or more precisely a "locality of consummation" test as the constitutional measurement for maritime tort jurisdiction. At the page which the court of appeals erroneously refers to as support for its premise, *The Plymouth* actually cites Mr. Justice Story's oft quoted observation:

"In regard to torts I have always understood that the jurisdiction of the admiralty is exclusively dependent upon the locality of the act." (*The Plymouth*, 3 Wall. (70 U.S.) 20, 33 (1865)).

not be stretching things more than just a little to say that beaches, marshes, non-navigable waters and lands adjoining the seacoast are of the same class of man made objects "erected against the violence of the sea" as were the items placed within admiralty jurisdiction by Louis XIV? Certainly there is nothing in the legislative history of the Admiralty Extension Act to indicate a legislative intentment to cause the shoreward reach of admiralty jurisdiction to grasp at the sort of injuries to property to which the Florida legislation is directed. The concern of Congress seems to have been collisions of vessels with such shore anchored structures as bridges and piers. See, Senate Report No. 1593, 80th Cong.2d Sess., U.S. Code Cong. Svc. (1948), pp. 1898-1904.

Finally, it might also be pointed out that in *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206, 210 (1963), this Court indicated that for the Admiralty Extension Act to apply to a land consummated tort (the constitutionality of the Act apparently not having been raised in that case) the impact must be felt ashore "at a time and place not remote from the wrongful act". We think that in the case of an oil spill or similar contaminating discharges from a vessel, the impact on shore would almost always be some distance from and some time later than the wrongful act.

In summary, we think that even if the Admiralty Extension Act were not facially violative of Article III, Section 2, Cl. 1 of the Constitution, it would still be an unconstitutional application to hold that it can expand federal admiralty jurisdiction so as to cover those particular torts towards which the Florida "Oil Spill Prevention and Pollution Control Act of 1970" is directed.

3. State legislation to protect beaches, marsh lands and non-navigable waters from injury due to oil spill and similar contaminating discharges on its offshore waters, if not wholly outside the constitutionally authorized scope of federal admiralty jurisdiction is nonetheless permitted to the States by the "saving" clause of 28 U.S.C.A. § 1333.

While vesting the federal courts with exclusive jurisdiction over admiralty proceedings, 28 U.S.C.A. § 1333 qualifies and limits the scope of this grant by:

"... saving to suitors in all cases all other remedies to which they are entitled."⁷

Construing similar language in the Judiciary Act of 1789, 1 Stat. 73 [i.e., "saving and reserving to suitors in all cases a common law remedy where the common law is competent to give it"], this Court said in *Waring v. Clarke*, 5 How. (46 U.S.) 441, 461 (1847), that the meaning of the "saving" clause was:

"... that in cases of concurrent jurisdiction in admiralty and common law, the jurisdiction in the latter is not taken away. The saving is for the benefit of suitors, plaintiff and defendant, when the plaintiff in a case of concurrent jurisdiction chooses to sue in the common law courts, so giving to himself and the defendant all the advantages which such tribunals can give to suitors in them."

Even under the if anything more restricted language of the "saving" clause as it appeared in the Judiciary Act

⁷While in our discussion of the constitutionality of the Admiralty Extension Act we were referring to the authority of Congress to legislate with respect to torts consummated on land, marshes and non-navigable waters, the "saving" clause also pertains to state jurisdiction respecting incidents or transactions upon navigable territorial waters.

of 1789, it was recognized that the reference to "common law" remedies did not restrict the states to the then existing common law forms or preclude the creation of new rights under statutory enactments so long as the remedy was of a type recognized at common law, see *C. J. Hendry Co. v. Moore*, 318 U.S. 133 (1943); *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109 (1924), including equity. *Knapp, Stout & Co. v. McCaffrey*, 177 U.S. 638 (1900).

The Admiralty Extension Act's legislative history shows that it was not intended to curtail the scope or operation of the "saving" clause, see Senate Report No. 1593, 80th Cong. 2d Sess., U.S. Code Cong. Service 1948, pp. 1898, 1899-1900, and the courts have uniformly held that it doesn't. See, e.g., *State Department of Fish and Game v. S. S. Bourne-mouth*, 307 F.Supp. 922, 925 (C.D. Calif. 1969); *Revel v. American Export Lines, Inc.*, 162 F.Supp. 279, 283 (E. D. Va. 1958), *aff'd*, 266 F.2d 82 (4th Cir. 1959). As stated in *Petition of New York Trap Rock Corporation*, 172 F.Supp. 638, 646 (S.D.N.Y. 1959):

"It [the Admiralty Extension Act] made a new, concurrent remedy in admiralty available for an already existing action at common law."

It consequently seems safe to say that the tort injuries with which the Florida Act is primarily concerned—undisputably beyond the scope of federal admiralty and maritime jurisdiction and undisputably a proper subject for state legislation prior to enactment of the Admiralty Extension Act—must at least remain within the area of "concurrent" state jurisdiction under the "saving" clause of 28 U.S.C.A. § 1333 after passage of the Admiralty Extension Act. We think that in the case at

bar the district court's holding that it was the *exclusive* federal admiralty domain into which the Florida legislation intruded, is erroneous, among other reasons, because it wholly overlooks the existence and effect of the "saving" clause. This error is perhaps most clearly demonstrated by the district court's quite misplaced reliance upon *Southern Pacific Company v. Jensen*, 244 U.S. 205 (1917), and *Knickerbocker Ice Company v. Stewart*, 253 U.S. 149 (1920). Those cases were concerned with injuries *consummated on navigable waters* rather than on land (the Court also noting in *Jensen* that the state remedy involved, workmen's compensation, was wholly foreign to the common law and hence within the area of *exclusive* federal admiralty jurisdiction because it was beyond the scope of the "saving" clause. 244 U.S., *supra*, at 218). These cases are obviously not apropos to consideration of the validity of Florida's "Oil Spill Prevention and Pollution Control Act of 1970", which deals (a) primarily with injuries which would be consummated on land, and (b) with a remedy which is essentially of a common law nature (e.g., trespass on the case), falling well within the scope of the "saving" clause of 28 U.S.C.A. § 1333. As stated in *Panama Railroad Company v. Vasquez*, 271 U.S. 557, 561 (1926):

"an action *in personam* to recover damages for tort is one of the most familiar of the common law remedies. . . ."

If federal admiralty jurisdiction exists at all with respect to the injuries and damage towards which the Florida Act is directed, we think the wrongs that Act deals with clearly fall within the area of "concurrent jurisdiction" under the "saving" clause of 28 U.S.C.A.

§ 1333 rather than within an area of exclusive federal jurisdiction.

4. A State may exercise its police powers to protect its property and the health and well being of its citizens through legislation affecting maritime matters so long as such legislation does not "conflict" with federal maritime law.

It has long been held that the grant of admiralty jurisdiction to the federal government under the Constitution and Judiciary Act does not preclude a state from exercising its police powers in its territorial waters in the absence of a conflict with federal maritime law. E.g., *Manchester v. Massachusetts*, 139 U.S. 240, 261 (1891); *C. J. Hendry Co. v. Moore*, 318 U.S. 133 (1943). In the somewhat related area of "interstate and foreign commerce", this Court long ago upheld the right of Louisiana to protect its citizens from yellow fever and cholera by subjecting all vessels approaching New Orleans to an inspection and the payment of an inspection fee, see, *Morgan's Steamship Company v. Louisiana Board of Health*, 118 U.S. 455 (1886), and more recently, in *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960), it was held that Detroit's Smoke Abatement Code could lawfully be applied to ships docked (on navigable waters) in the Port of Detroit. In the latter case, this Court said:

"The mere possession of a federal license, however, does not immunize a ship from the operation of the normal incidents of local police power, not constituting a direct regulation of commerce. Thus, a federally licensed vessel is not, as such, exempt from local pilotage laws, *Cooley v. Board of Wardens of Port of Philadelphia*, 12 How. 299, or local quarantine laws, *Morgan's Steamship Co. v. Louis-*

iana Board of Health, 118 U.S. 455, or local safety inspections, *Kelly v. Washington*, 302 U.S. 1, or the local regulation of wharves and docks, *Packet Co. v. Catlettsburg*, 105 U.S. 559. Indeed this Court has gone so far as to hold that a state, in the exercise of its police power, may actually seize and pronounce the forfeiture of a vessel 'licensed for the coasting trade, under the laws of the United States, while engaged in that trade,' 18 How. 71, 74."

The only extent to which federal admiralty jurisdiction limits the state's exercise of its legitimate police powers to protect its fisheries, wildlife, property and the health of its citizens is that state regulation must not conflict with federal maritime law. See, e.g., *Red Cross Line v. Atlantic Fruit Company*, 264 U.S. 109, 125 (1924); *Manchester v. Massachusetts*, *supra*. As we will show in the following section of this brief, it is unlikely that any conflict exists between federal and state legislation in the present case, but even if certain conflicts were to be established there would still be no basis for invalidating Florida's Act in its entirety—the proper remedy in this situation being to hold simply that in any instance of conflict the federal law prevails.

5. There is no "conflict" between Florida's "Oil Spill Prevention and Pollution Control Act of 1970" and federal maritime law, but even if such conflict existed it would not be of such nature and scope as to justify the invalidating of the entire Act rather than simply the points of actual conflict.

We recognize, of course, that state legislation affecting maritime matters, whether permissible because it is within the scope of the "saving" clause of 28 U.S.C.A. § 1333 or because it is a valid exercise of the legitimate police powers of the state, cannot be permitted to nullify

or frustrate federal maritime law or defeat the essential features of federal admiralty jurisdiction. The test of the validity of state legislation in these "concurrent jurisdiction" and permissible "police power" areas is ordinarily that of the existence of *conflict* between state and federal law. See, e.g., *Red Cross Line v. Atlantic Fruit Company*, 264 U.S. 109, 125 (1924); *Manchester v. Massachusetts*, 139 U.S. 240, 261 (1891). As stated in *Just v. Chambers*, 312 U.S. 383, 388 (1941):

"With respect to maritime torts we have held that the State may modify or supplement the maritime law by creating liability which a court of admiralty will recognize and enforce when the state action is not hostile to the characteristic features of the maritime law or inconsistent with federal legislation."

The Court subsequently pointed out in this same case that:

"Uniformity is required *only where the essential features of an exclusive federal jurisdiction are involved.*" 312 U.S. at p. 392. [Emphasis added.]

At the very start of this brief, we noted that the federal "Water Quality Improvement Act of 1970", 84 Stat. 91 (33 U.S.C.A. § 1161 et seq.), expressly contemplates parallel state action in the fight to prevent pollution injury to fish, wildlife, public health and public or private property as the result of oil spills, 33 U.S.C.A. § 1161(e), and expressly provides that it shall not be construed so as to preempt the right of a state to impose any other requirement or liability with respect to the discharge of oil into any waters within the State, or affect any state or local law not in conflict with the federal Act. We find considerable difficulty in seeing how

state legislation such as Florida has enacted can be in conflict with a federal law when it does exactly that which the federal Act authorized it to do. Particularly is this so when it is clear under the cases just cited that "different" is not to be equated with "conflict", and that it is perfectly permissible for a state to add to or supplement the federal law. The court below attributed considerable importance to the fact that the measure of liability to the State and its citizens under the Florida Act is different from the measure of liability to the federal government under the federal Act. We agree that there is a "difference" but deny there is a "conflict". Why should the measure of liability to the state and federal government be the same? Is not the strong public policy of reducing pollution and oil spill damage advanced rather than injured by the existence of supplementary state remedies?

In any event, the existence of conflict on this or any other point can scarcely justify a holding that Florida's Act is unconstitutional in its entirety. We respectfully submit that any problem along this line can more appropriately be handled by conforming Florida's Act to the appropriate federal standards. Thus, in holding the Limitation of Liability Act, 46 U.S.C.A. § 183 et seq. available to limit a ship owner's liability for oil spill in navigable waters under Maryland's oil spill and pollution prevention act, a district court in that state found no difficulty in making the limitation defense available to a defendant without holding Maryland's legislation to be in any way "unconstitutional". See, *In Re Harbor Towing Corporation*, _____ F.Supp. _____, 3 Environment Reporter—Cases 1607 (D. Md. No. 70-20-N, decided Nov. 10, 1971); see also, *Richardson v. Har-*

mon, 222 U.S. 96 (1911) [applying the ship owner's liability limitation statute to a non-maritime tort action brought in the State courts].

CONCLUSION

This case is of the utmost importance to the right of the coastal states to protect their beaches, marsh lands, coastal properties, non-navigable waters, and marine related industries, as well as the physical and economic well being of their citizens, against the ravages of pollution emanating from oil spills and similar contaminating discharges upon their coastal waters. For the reasons stated in this brief, we think the opinion of the court below is erroneous and respectfully submit that its decision should be reversed.

ARTHUR K. BOLTON
Attorney General

HAROLD N. HILL, JR.
Executive Assistant
Attorney General

ALFRED L. EVANS, JR.
Assistant Attorney General

PLEASE ADDRESS ALL
COMMUNICATIONS TO:

ALFRED L. EVANS, JR.
Assistant Attorney General
132 State Judicial Building
40 Capitol Square
Atlanta, Georgia 30334
Telephone (404) 656-3330

JAMES B. TALLEY
Assistant Attorney General

COURTNEY WILDER STANTON
Assistant Attorney General

TABLE OF CONTENTS

	PAGE
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATEMENT	2
 ARGUMENT:	
I. The admiralty and maritime jurisdiction of the federal government does not preclude the proper exercise of state police power to protect the states' natural resources from irreparable damage caused by oil	6
II. The intention of Congress to preempt the exercise of police power by the state must be clearly manifested	10
CONCLUSION	13
 APPENDIX:	
Constitution of the United States, Article III, Section 2	1a
Water Quality Improvement Act of 1970	1a
Submerged Lands Act of 1953	16a
Limitation of Liability Act	19a
Annotated Code of Maryland (1964 Replacement Volume, 1971 Supplement), Article 96A, Sections 23-29D	20a
Laws of Maryland of 1972, Chapter 356	35a

TABLE OF CITATIONS

Cases

Bethlehem Steel v. New York State Labor Relations Board, 330 U.S. 767	10, 12
Cooley v. Board of Wardens, 53 U.S. 299	8
Corsa v. Tawes, 149 F. Supp. 771	8

	PAGE
Florida Lime and Avocado Growers, 373 U.S. 132	12
Gibbons v. Ogden, 22 U.S. 1	8
Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440	10
Knickerbocker Ice Co. v. Stewart, 253 U.S. 205	7
Lawton v. Steele, 152 U.S. 133	8
Prudential Insurance Co. v. Benjamin, 328 U.S. 408	11
Reid v. Colorado, 187 U.S. 137	11
Southern Pacific Co. v. Arizona, 325 U.S. 761	9
Southern Pacific Co. v. Jensen, 244 U.S. 205	7, 9
Standard Dredging Co. v. Michael Murphy, 319 U.S. 306	7

Statutes

Annotated Code of Maryland (1964 Replacement Volume, 1971 Supplement), Article 96A, Sections 23-29D	4
Constitution of the United States, Article III, Section 2	7, 8
Laws of Florida, Chapter 70-244, Oil Spill Prevention and Pollution Control Act of 1970 (Fla. Stat. Ann. Chapter 376)	6, 12
Laws of Maryland of 1972, Chapter 356	5
28 U.S.C., Section 1253	2
Section 2281	1
Section 2284	1
33 U.S.C., Section 1161 (Water Quality Improvement Act of 1970, 84 Stat. 91)	11, 12
43 U.S.C., Section 1311 (Submerged Lands Act of 1953)	9
46 U.S.C., Section 183 (Limitation of Liability Act)	12

Miscellaneous

Supreme Court Rules of Procedure, Rule 42(4)	2
--	---

IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

No. ~~71~~-1082

REUBIN O'D. ASKEW, ET AL.,

Appellants,

v.

THE AMERICAN WATERWAY OPERATORS, INC.,
ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

**BRIEF FOR THE STATE OF MARYLAND
AS AMICUS CURIAE**

OPINION BELOW

The opinion of the three-judge District Court (Fla. App. 39) is reported at 335 F. Supp. 1241.

JURISDICTION

This appeal is from a final order entered in a suit for injunctive relief pursuant to 28 U.S.C., Sections 2281, 2284(3). The order was entered December 10, 1971. Notice of appeal was filed in the United States District Court,

Northern District of Florida, December 23, 1971. Jurisdiction of this Court is invoked in accordance with the provisions of 28 U.S.C., Section 1253, authorizing appeal from an order of a three-judge court permanently enjoining enforcement of a state statute when such order gives rise to a substantial question such as one involving conflict between state and federal interests. On April 17, 1972, this Court noted probable jurisdiction based on 28 U.S.C., Section 1253.

The State of Maryland files as amicus curiae pursuant to Rule 42(4), Supreme Court Rules of Procedure.

QUESTIONS PRESENTED

1. Whether the existence of the admiralty and maritime jurisdiction of the federal government precludes the proper exercise of the state police power to protect the states' natural resources from irreparable damage caused by oil.
2. Whether the states are preempted from enacting legislation to protect their natural resources from damage caused by oil because of federal legislation presently in force.

STATEMENT

Maryland is geographically a small state, encompassing 12,303 square miles. Of that total, 9,874 square miles are land and 703 square miles are inland water. The remaining 1,726 square miles represent the Chesapeake Bay, Maryland's great inland sea. The Bay is 195 miles long and from 2 to 22 miles wide. In addition to its vast area in Maryland, the Chesapeake Bay encompasses 1,511 square miles in the State of Virginia. Navigable to ocean-going ships, the Bay has two outlets to the Atlantic Ocean, one through the Chesapeake and Delaware Canal and one through its mouth.

Maryland is a water-oriented state. Fifteen of Maryland's 23 counties border on tidal water. The length of tidal shoreline in the state is 3,190 miles.

The Chesapeake Bay is the main source of Maryland's seafood industry, an industry which annually produces fish, crabs, oysters and clams valued at more than 19 million dollars dockside and more than 50 million dollars when processed. Maryland produces more than 50% of the nation's clams, more than 50% of the nation's striped bass and more than 30% of the nation's oysters. The Bay also produces more than one-half of the nation's blue crabs.

Maryland's fishing industry and related food-processing industry employ approximately 13,300 people, of which well over two-thirds are on a full-time basis. Recent studies have indicated that between 200,000 and 300,000 Marylanders annually spend an estimated 20 million dollars on goods and services needed to engage in saltwater angling. In addition to this, Maryland's fishing fleet has been valued as of January, 1970, at 149 million dollars.

The State is most concerned that these activities be protected. That oil pollution constitutes a threat to the vitality of the seafood-related industries cannot be questioned.

Wetland areas are a significant resource of the State of Maryland and constitute an irreplaceable link in life process. Many times as fertile as the best cultivated lands, such areas are unfortunately extremely sensitive to man's activities. These privately and publicly owned lands, subject to tidal flow, can be irreparably damaged by oil pollution. Since 60% to 90% of all fish are found at some time during their life cycles in a wetland habitat, it is in the State's interest to undertake programs which will serve to protect as much as possible these valuable areas.

The unique nature of wetlands and open surface waters found in the State makes Maryland an important area for migrating and wintering waterfowl. Approximately 35,000 people hunt in the Chesapeake Bay region and spend between 10.5 and 17.5 million dollars annually. These figures are augmented by the expenditure of over \$60,000 annually in the hunting of rail birds and snipe and by roughly \$250,000 for the purchase of furbearer pelts. The effect of oil pollution on wildfowl has been too well documented by recent oil spill disasters, including a number in the State of Maryland. Birds are extremely vulnerable to oil while nesting or fishing on the water. The oil leaves these birds helpless to care for themselves and faced with death by starvation or by a predator that they now are no longer able to evade. The State must have the power to insure that these tragedies will not occur again.

The very large amounts of oil shipped annually through the Port of Baltimore pose a constant threat to Maryland waters. For the calendar year of 1971, 6,997,487 tons of petroleum and petroleum products entered the Baltimore harbor. Approximately 4,000 ships used the port during 1971. Few states can claim so vital a maritime operation. The benefits that such a port bring to the people of Maryland must be balanced against the special dangers and responsibilities inherent in moving these very large amounts of oil and in directing Baltimore's increasingly busy facility.

Through the enactment of strict and progressive laws Maryland, like Florida, has sought to conserve its valuable water resources and thereby advance, preserve and protect the health, safety and welfare of its citizens.

The Maryland legislature by Chapter 243, Acts of 1970, effective July 1, 1970, enacted Sections 23-29D of Article

96A of the Maryland Code. Of greatest interest in connection with the issues now before this Court are the provisions of Section 29, which deal specifically with the discharge of oil upon navigable waters. This section clearly makes it a criminal offense to discharge oil in Maryland waters. Section 29B of the same article provides the state with a civil remedy to recover the costs of cleanup expenses:

"The Maryland Port Authority and the Department of Natural Resources shall charge and collect a compensatory fee from the person responsible for the oil spillage. This fee shall cover the cost of labor, equipment operation, and materials necessary to eliminate the residue of oil spillage and the cost of restoring areas damaged by the spillage to their original condition and said fee shall be retained by the agency charging the fee."

Section 29BC allows recovery against the person responsible for the spillage by any person to the full extent of any damages to his real and personal property. Section 29D of that same article empowers the Department of Natural Resources "to require the repair of any damage done and the restoration of water resources", including mortality to fish and other aquatic life.

Further additions to Section 29 of Article 96A of the Maryland Code have recently been passed by the legislature and signed into law by the Governor of Maryland on May 26, 1972. Sections E through G, inclusive, now provide for a license fee on oil terminal facilities based on the oil storage capacity at the facility as this reflects possible impact to the natural resources of the State and also as the size of the facility reflects the utilization of these natural resources. The license fees revert to a fund which is used by the Department of Natural Resources basically to respond to oil spills, contain the same and restore the

waters when the immediate violator or discharger is not present or known. These provisions will have an effective date of July 1, 1972.

Though the Maryland oil spill provisions are not identical to those of Florida, the opinion of the lower court is so broad as to threaten all attempts by the individual states to cope with the increasing danger of oil pollution, which has such a catastrophic effect on their natural resources. The threat of oil pollution increases daily as greater volumes of oil are shipped in response to the nation's rising needs. In addition, offshore drilling in the Atlantic is contemplated for the future. The State has a strong interest in seeing that this is done properly and that the environment does not suffer.

Oil pollution of the water and its resultant damage to aquatic life is a problem unique to Maryland and other coastal states. Some of the states, including Maryland, have recognized these problems and have sought to deal effectively with them. Should this Court accept the reasoning of the lower court, state efforts to provide for a uniquely local problem will be severely retarded.

ARGUMENT

I.

THE ADMIRALTY AND MARITIME JURISDICTION OF THE FEDERAL GOVERNMENT DOES NOT PRECLUDE THE PROPER EXERCISE OF STATE POLICE POWER TO PROTECT THE STATES' NATURAL RESOURCES FROM IRREPARABLE DAMAGE CAUSED BY OIL.

In granting an injunction permanently enjoining the enforcement of the Florida Oil Spill Prevention and Pollution Control Act, Chapter 376, Florida Statutes Annotated, Chapter 70-224, the lower court cited the state legislation as an impermissible intrusion into the admiralty domain

as defined by Article III, Section 2 of the United States Constitution and later cases. The three-judge federal court relies heavily on *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), and *Knickerbocker Ice Company v. Stewart*, 253 U.S. 149 (1920), as authority for this position. Mr. Justice McReynolds, in writing for a five to four majority in *Jensen*, stressed the importance of uniformity in this area of the law. Just as states may not regulate interstate commerce where the subject is national in character and requires uniform regulation so, he argued, they may not legislate in maritime matters in such a way as to destroy "the very uniformity in respect to maritime matters which the Constitution was designed to establish or to hamper or impede freedom of navigation between the states and with foreign countries"; at 215.

The court's reliance on *Jensen* is inappropriate since not only is this decision not authority for the district court's determination but its own vitality is open to serious question. Mr. Justice Black, writing for the Court, in *Standard Dredging Corp. v. Michael Murphy*, 319 U.S. 306 (1943), indicated that *Jensen* had application only to workmen's compensation cases. "Indeed, the *Jensen* case has already been severely limited, and has no vitality beyond that which may continue as to workmen's compensation laws"; at 309 (emphasis supplied). The opinion goes on to speak to a fact situation closely parallel to the case at bar.

"... Taxes on vessels and other business activities of operators have previously been upheld. We hold that nothing in Art. 3 sec. 2 of the Constitution places this tax beyond the authority of the state." at 310.

The issue of what constitutes permissible state legislation, regulating activities on navigable waters, is not a new one to this Court. In 1824 Mr. Chief Justice Marshall,

writing for the Court, found that the New York Legislature's grant of a right of exclusive navigation upon the waterways of the state was constitutionally impermissible; *Gibbons v. Ogden*, 22 U.S. 1 (1824). Marshall sought to harmonize the sometimes different concerns of the state and federal governments not by resort to Article III, Section 2 of the United States Constitution and a rather doctrinaire concept of strict uniformity but by allowing the states to regulate when there is no conflict with federal legislation under the commerce clause.

Cooley v. Board of Wardens, 53 U.S. 299 (1851), represents the genesis of the modern test of permissible state burdens on interstate commerce. Even though the pilotage fees involved state regulations of an activity upon navigable water, the Court chose to ignore any question of necessary maritime uniformity and rather formulated a more flexible litmus of when state regulation will be permitted. The Court indicated that, if as to a particular matter the benefits of state regulation outweigh the burdens on interstate commerce, then diversity of treatment will be permitted.

The Florida oil spill statute, found unconstitutional by the three-judge court, was an attempt by that state to legislate for the protection of its natural resources. Courts have traditionally recognized this right of the states to protect that over which they have a proprietary interest. See *Corsa v. Tawes*, 149 F. Supp. 771 (D.C. Md., 1956); *Lawton v. Steele*, 152 U.S. 133 (1894). Indeed, the mere instance of a constitutional power in the federal government does not preclude the exercise of state police powers with respect to all matters which might be made subject to national powers. For example, regarding the commerce power, which should have been the determinative

grounds in the case at bar, this Court in *Southern Pacific Co. v. Arizona*, 325 U.S. 76 (1945), stated:

"... Although the commerce clause conferred on the national government power to regulate commerce, its possession of that power does not exclude all state power of regulation."

Relying on *Southern Pacific Co. v. Arizona*, *supra*, Judge Sobeloff in *Corsa v. Tawes*, *supra*, found the State of Maryland's exercise of its police power to regulate the commercial fishing industry within the three-mile limit to be valid as a subject permitting of diversity:

"... [T]he same constitution which puts interstate commerce under the protection of Congress recognizes the sovereignty of the states in local regulation for the protection of their natural resources. If the adverse effect on interstate commerce is only incidental and indirect and is outweighed by the local benefits which the statute is designed to achieve, the commerce clause will not render the enactment invalid" at 776. (emphasis supplied)

Under the Submerged Lands Act of 1953, 43 U.S.C. 1311, Congress vested the states with a proprietary interest in the submerged lands from the shore to the three-mile limit. The states were charged with responsibilities: to manage, administer, lease, develop and use the submerged lands in accordance with applicable state law. Since there can be no doubt that oil pollution of the states' coastal waters will have the most catastrophic effect on marine life and its dependent industries, frustration of state initiatives such as Florida's, will leave the states powerless to carry out their responsibilities under the Submerged Lands Act, *supra*.

Justice McReynolds correctly stated in *Southern Pacific Co. v. Jensen*, *supra*, the similarity between permissible

state regulation in interstate commerce and permissible state regulation in maritime activities. In the exercise of its police power the states may act, in maritime and interstate commerce activities, concurrently with the federal government, except in fields preempted by Congress. See, e.g., *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960), involving a vessel on navigable waters having to comply with local air quality laws. The Court found that no impermissible burden is imposed on interstate commerce by the application to a steam vessel operating in interstate commerce of a city's smoke abatement code, notwithstanding that, unless it undergoes structural alteration, such a vessel cannot, without violating the code, perform within the city the necessary cleaning of its fires.

II.

THE INTENTION OF CONGRESS TO PREEMPT THE EXERCISE OF POLICE POWER BY THE STATE MUST BE CLEARLY MANIFESTED.

A careful study of the case law leads one to the conclusion that this Court has historically been reluctant to declare that an act of Congress has preemptive effect, particularly where such a holding would leave the states powerless as to health and safety matters in areas where local concern is great. In *Bethlehem Steel v. New York State Labor Relations Board*, 330 U.S. 767 (1947), Mr. Justice Frankfurter stated, at page 780:

"... Since Congress can, if it chooses, entirely displace the states to the full extent of the far-reaching commerce clause, Congress needs no help from generous judicial implications to achieve the supersession of state authority. To construe Federal legislation so as not needlessly to forbid pre-existing state authority is to respect our Federal system. Any indulgence in construction should be in favor of the states, because Congress can speak with drastic clarity whenever it

chooses to assure full Federal authority, completely displacing the states." (emphasis supplied)

In *Reid v. Colorado*, 187 U.S. 137 (1902), the Supreme Court stated:

"It should never be held that Congress intends to supersede, or by its legislation suspend, the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested. This Court has said — and the principle has been often reaffirmed — that 'in the application of this principle of supremacy of an act of Congress in a case where the state law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.' *Sinnott v. Davenport*, 22 How. 227, 243, 16 L. Ed. 243, 247."

The District Court stated that state legislation, such as Florida has enacted, conflicts with the federal "Water Quality Improvement Act of 1970", 84 Stat. 91 (33 U.S.C. Sections 1161, *et seq.*). But the federal legislation, far from preempting the field, actually extends an invitation to the states to supplement the federal approach. For example, 33 U.S.C. Section 1161(e) and (o)2 expressly provide that the federal statute will not preclude any state from enacting any additional requirement or liability with respect to the discharge of oil. If, as the lower court states, Congress is unable to extend this right to the states, then subsections (e) and (o)2 of Section 1161 are a nullity. Since this Court has previously found Congressional delegation to the states of the power to enact laws destructive of constitutionally required uniformity to be a proper exercise of Congressional power, these subsections of Section 1161 are effective in extending to the states power to legislate in this area. See *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946).

In light of the express words of Congress contained in the Water Quality Improvement Act, *supra*, and the statement by Mr. Justice Frankfurter in *Bethlehem Steel v. New York State Labor Relations Board*, *supra*, that "any indulgence in construction should be in favor of the states" (at 780), Florida's Oil Spill Prevention Act cannot be said to have been preempted by the Federal Water Quality Improvement Act.

The Florida legislation provides for liability to the full extent of any damages provable. The lower court found this to be in conflict with the Limitation of Liability Act, 46 U.S.C., Sections 183, *et seq.* This statute, which restricts the liability of shipowners to the extent of their investment, does not prevent states from enacting liability statutes of their own, and there is nothing in the Limitation of Liability Act which states otherwise. This Court has stated that preemption will only be found where (1) there is direct conflict between the two schemes of regulation, such that both cannot stand, (2) there is a specific statement of Congressional intent to preempt the field, or (3) the nature of the subject matter of the regulation must be such as to permit no other conclusion than that Congress intended to preempt the field. See *Florida Lime and Avocado Growers*, 373 U.S. 132 (1963).

Clearly, the federal limited liability statute can exist side by side with either the Florida or Maryland liability provisions. Compliance with either the state or federal act does not place a party in violation of the other. Secondly, as indicated, there are no express words of preemption. Lastly, the subject matter of the regulation is uniquely local in nature, and it is manifest that Congress considered it to be such and has encouraged a local response to local problems.

CONCLUSION

Drawn into question is the ability of the coastal states to protect their marshes and beaches, to protect their navigable and nonnavigable waters and to protect the myriad life forms which exist in these areas from the ravages of oil pollution. It has been the unwavering intent of Congress to provide for a local response to what are uniquely local problems. The decision of the lower court drastically weakens that approach by imposing the most serious legal restraints on the states' right to legislate in the field of water pollution. This Court has nourished and sustained our system of federalism in the past. The District Court decision constitutes an unfortunate blow to this working relationship and should be overturned.

Respectfully submitted,

FRANCIS B. BURCH,

Attorney General of Maryland,

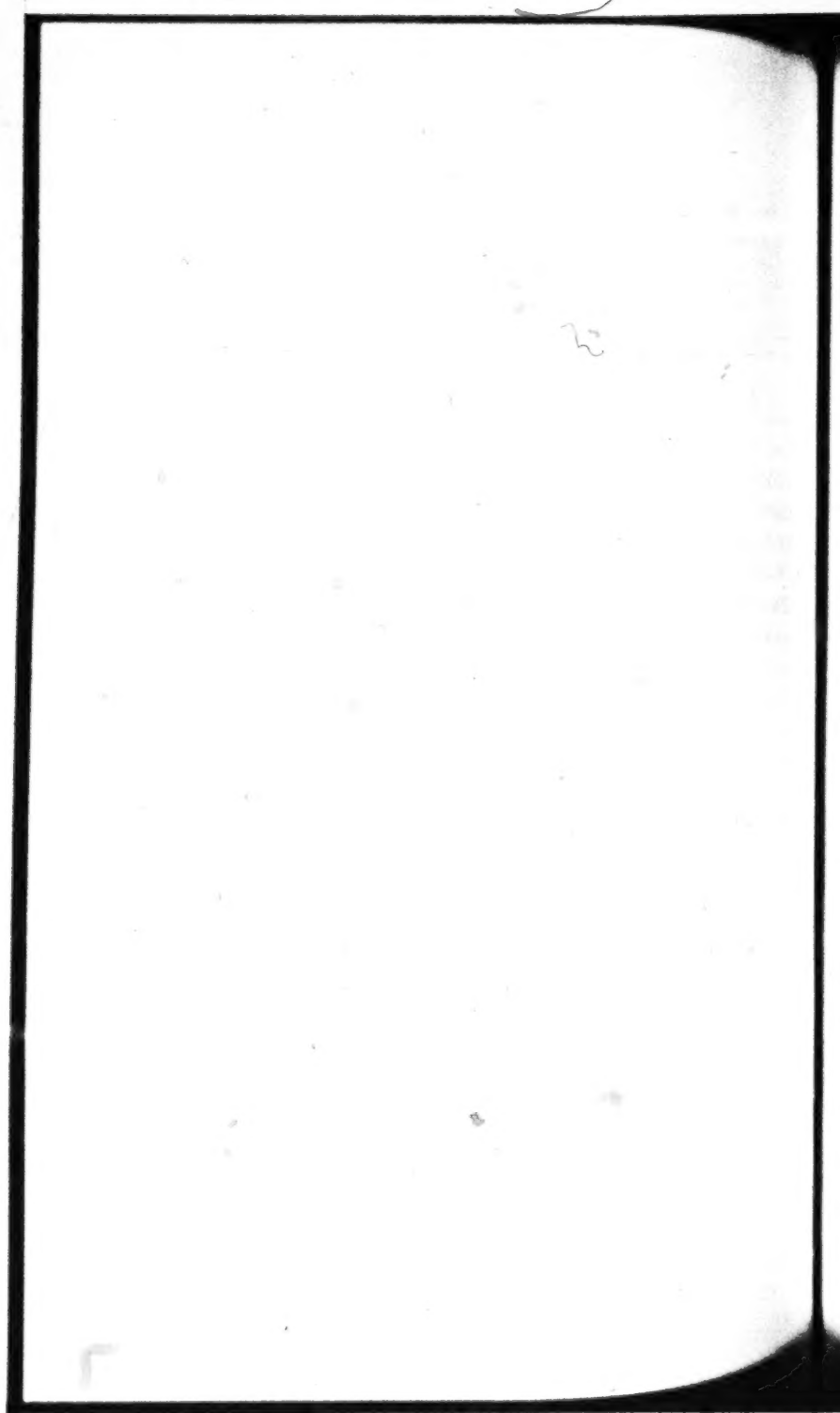
HENRY R. LORD,

Deputy Attorney General
of Maryland,

WARREN K. RICH,

Assistant Attorney General
of Maryland,

Attorneys for State of
Maryland, Amicus Curiae.



APPENDIX

CONSTITUTION OF THE UNITED STATES

Article III

* * * * *

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

* * * * *

WATER QUALITY IMPROVEMENT ACT OF 1970

* * * * *

Navigable Waters

(Chapter 23)

§ 1161. Control of pollution by oil — Definitions

(a) For the purpose of this section, the term—

(1) "oil" means oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil;

(2) "discharge" includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying or dumping;

(3) "vessel" means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water other than a public vessel;

(4) "public vessel" means a vessel owned or bare-boat chartered and operated by the United States, or by a State or political subdivision thereof, or by a foreign nation, except when such vessel is engaged in commerce;

(5) "United States" means the States, the District of Columbia, the Commonwealth of Puerto Rico, the Canal Zone, Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands;

(6) "owner or operator" means (A) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, and (B) in the case of an onshore facility, and an offshore facility, any person owning or operating such onshore facility or offshore facility, and (C) in the case of any abandoned offshore facility, the person who owned or operated such facility immediately prior to such abandonment;

(7) "person" includes an individual, firm, corporation, association, and a partnership.

(8) "remove" or "removal" refers to removal of the oil from the water and shorelines or the taking of such other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches;

(9) "contiguous zone" means the entire zone established or to be established by the United States under article 24 of the Convention on the Territorial Sea and the Contiguous Zone;

(10) "onshore facility" means any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land within the United States other than submerged land;

(11) "offshore facility" means any facility of any kind located in, on, or under, any of the navigable waters of the United States other than a vessel or a public vessel;

(12) "act of God" means an act occasioned by an unanticipated grave natural disaster;

(13) "barrel" means 42 United States gallons at 60 degrees Fahrenheit.

Congressional declaration of policy; prohibition against discharge of oil; exceptions; rules and regulations; determination of harmful quantities of discharged oil; notification of United States of discharge of oil; penalties for failure to notify; procedure for imposition of civil penalties for knowingly discharging oil; withholding of clearance

(b) (1) The Congress hereby declares that it is the policy of the United States that there should be no discharges of oil into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone.

(2) The discharge of oil into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone in harmful quantities as determined by the President under paragraph (3) of this subsection, is prohibited, except (A) in the case of such discharges into the waters of the contiguous zone, where permitted under article IV of the International Convention for the Prevention of Pollution of the Sea by Oil, 1954, as amended, and (B) where permitted in quantities and at times and locations or under such circumstances or conditions as the President may, by regulation, determine not to be harmful. Any regulations issued under this subsection shall be consistent with maritime safety and with marine and navigation laws and regulations and applicable water quality standards.

(3) The President shall, by regulation, to be issued as soon as possible after April 3, 1970, determine for the purposes of this section, those quantities of oil the discharge of which, at such times, locations, circumstances, and conditions, will be harmful to the public health or welfare of the United States, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches, except that in the case of the discharge of oil into or upon the waters of the contiguous zone, only

those discharges which threaten the fishery resources of the contiguous zone or threaten to pollute or contribute to the pollution of the territory or the territorial sea of the United States may be determined to be harmful.

(4) Any person in charge of a vessel or of an onshore facility or an offshore facility shall, as soon as he has knowledge of any discharge of oil from such vessel or facility in violation of paragraph (2) of this subsection, immediately notify the appropriate agency of the United States Government of such discharge. Any such person who fails to notify immediately such agency of such discharge shall, upon conviction, be fined not more than \$10,000, or imprisoned for not more than one year, or both. Notification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement.

(5) Any owner or operator of any vessel, onshore facility, or offshore facility from which oil is knowingly discharged in violation of paragraph (2) of this subsection shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than \$10,000 for each offense. No penalty shall be assessed unless the owner or operator charged shall have been given notice and opportunity for a hearing on such charge. Each violation is a separate offense. Any such civil penalty may be compromised by such Secretary. In determining the amount of the penalty, or the amount agreed upon in compromise, the appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation, shall be considered by such Secretary. The Secretary of the Treasury shall withhold at the request of such Secretary the clearance required by section 91 of Title 46, of any vessel the owner or operator of which is subject to the foregoing penalty. Clearance may be granted in such cases upon the filing of a bond or other surety satisfactory to such Secretary.

National Contingency Plan for removal of discharged oil; provision; revisions; compliance

(c) (1) Whenever any oil is discharged, into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, the President is authorized to act to remove or arrange for the removal of such oil at any time, unless he determines such removal will be done properly by the owner or operator of the vessel, onshore facility, or offshore facility from which the discharge occurs.

(2) Within sixty days after April 3, 1970, the President shall prepare and publish a National Contingency Plan for removal of oil pursuant to this subsection. Such National Contingency Plan shall provide for efficient, coordinated, and effective action to minimize damage from oil discharges, including containment, dispersal, and removal of oil, and shall include, but not be limited to—

(A) assignment of duties and responsibilities among Federal departments and agencies in coordination with State and local agencies, including, but not limited to, water pollution control, conservation, and port authorities;

(B) identification, procurement, maintenance, and storage of equipment and supplies;

(C) establishment or designation of a strike force consisting of personnel who shall be trained, prepared, and available to provide necessary services to carry out the Plan, including the establishment at major ports, to be determined by the President, of emergency task forces of trained personnel, adequate oil pollution control equipment and material, and a detailed oil pollution prevention and removal plan;

(D) a system of surveillance and notice designed to insure earliest possible notice of discharges of oil to the appropriate Federal agency;

(E) establishment of a national center to provide coordination and direction for operations in carrying out the Plan;

(F) procedures and techniques to be employed in identifying, containing, dispersing, and removing oil; and

(G) a schedule, prepared in cooperation with the States, identifying (i) dispersants and other chemicals, if any, that may be used in carrying out the Plan, (ii) the waters in which such dispersants and chemicals may be used, and (iii) the quantities of such dispersant or chemical which can be used safely in such waters, which schedule shall provide in the case of any dispersant, chemical, or waters not specifically identified in such schedule that the President, or his delegate, may, on a case-by-case basis, identify the dispersants and other chemicals which may be used, the waters in which they may be used, and the quantities which can be used safely in such waters.

The President may, from time to time, as he deems advisable, revise or otherwise amend the National Contingency Plan. After publication of the National Contingency Plan, the removal of oil and actions to minimize damage from oil discharges shall, to the greatest extent possible, be in accordance with the National Contingency Plan.

Marine disasters; creation of a substantial threat of a pollution hazard; removal or elimination of pollution hazard; removal or destruction of vessel; employment of personnel; expenses

(d) Whenever a marine disaster in or upon the navigable waters of the United States has created a substantial threat of a pollution hazard to the public health or welfare of the United States, including, but not limited to, fish, shellfish, and wildlife and the public and private shorelines and beaches of the United States, because of a discharge, or an imminent discharge, of large quantities of oil from a vessel the United States may (A) coordinate and direct all public and private efforts directed at the removal or elimination of such threat; and (B) summarily remove, and, if necessary, destroy such vessel by whatever means are available without regard to any provision of law gov-

erning the employment of personnel or the expenditure of appropriated funds. Any expense incurred under this subsection shall be a cost incurred by the United States Government for the purposes of subsection (f) of this section in the removal of oil.

Action by United States attorney to abate actual or threatened discharge of oil from an onshore or offshore facility; jurisdiction; nature of relief.

(e) In addition to any other action taken by a State or local government, when the President determines there is an imminent and substantial threat to the public health or welfare of the United States, including, but not limited to, fish, shellfish, and wildlife and public and private property, shorelines, and beaches within the United States, because of an actual or threatened discharge of oil into or upon the navigable waters of the United States from an onshore or offshore facility, the President may require the United States attorney of the district in which the threat occurs to secure such relief as may be necessary to abate such threat, and the district courts of the United States shall have jurisdiction to grant such relief as the public interest and the equities of the case may require.

Liability of owner or operator of vessel, onshore facility, or offshore facility for discharge of oil; exceptions; amount of liability; procedure for recovery.

(f) (1) Except where an owner or operator can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any vessel from which oil is discharged in violation of subsection (b) (2) of this section shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section

for the removal of such oil by the United States Government in an amount not to exceed \$100 per gross ton of such vessel or \$14,000,000, whichever is lesser, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. Such costs shall constitute a maritime lien on such vessel which may be recovered in an action in rem in the district court of the United States for any district within which any vessel may be found. The United States may also bring an action against the owner or operator of such vessel in any court of competent jurisdiction to recover such costs.

(2) Except where an owner or operator of an onshore facility can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any such facility from which oil is discharged in violation of subsection (b) (2) of this section shall be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil by the United States Government in an amount not to exceed \$8,000,000, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. The United States may bring an action against the owner or operator of such facility in any court of competent jurisdiction to recover such costs. The Secretary is authorized, by regulation, after consultation with the Secretary of Commerce and the Small Business Administration, to establish reasonable and equitable classifications of those onshore facilities having a total fixed storage capacity of 1,000 barrels or less which he deter-

mines because of size, type, and location do not present a substantial risk of the discharge of oil in violation of subsection (b) (2) of this section, and apply with respect to such classifications differing limits of liability which may be less than the amount contained in this paragraph.

(3) Except where an owner or operator of an offshore facility can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any such facility from which oil is discharged in violation of subsection (b) (2) of this section shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil by the United States Government in an amount not to exceed \$8,000,000, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. The United States may bring an action against the owner or operator of such a facility in any court of competent jurisdiction to recover such costs.

Proof by owner or operator of vessel, onshore facility, or offshore facility of liability of third party for discharge of oil; exceptions to third party liability; amount of liability; procedure for recovery.

(g) In any case where an owner or operator of a vessel, of an onshore facility, or of an offshore facility, from which oil is discharged in violation of subsection (b) (2) of this section proves that such discharge of oil was caused solely by an act or omission of a third party, or was caused solely by such an act or omission in combination with an act of God, an act of war, or negligence on the part of the United

States Government, such third party shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for removal of such oil by the United States Government, except where such third party can prove that such discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of another party without regard to whether such act or omission was or was not negligent, or any combination of the foregoing clauses. If such third party was the owner or operator of a vessel which caused the discharge of oil in violation of subsection (b) (2) of this section, the liability of such third party under this subsection shall not exceed \$100 per gross ton of such vessel or \$14,000,000, whichever is the lesser. In any other case the liability of such third party shall not exceed the limitation which would have been applicable to the owner or operator of the vessel or the onshore or offshore facility from which the discharge actually occurred, if such owner or operator were liable. If the United States can show that the discharge of oil in violation of subsection (b) (2) of this section was the result of willful negligence or willful misconduct within the privity and knowledge of such third party, such third party shall be liable to the United States Government for the full amount of such removal costs. The United States may bring an action against the third party in any court of competent jurisdiction to recover such removal costs.

Preservation of rights of owner or operator of vessel,
onshore facility, or offshore facility, or United
States against any third party.

(h) The liabilities established by this section shall in no way affect any rights which (1) the owner or operator of a vessel or of an onshore facility or an offshore facility may have against any third party whose acts may in any way have caused or contributed to such discharge, or (2) the United States Government may have against any third party whose actions may in any way have caused or contributed to the discharge of oil.

Removal by owner or operator of vessel, onshore facility, or offshore facility of discharged oil; suit against United States for recovery of reasonable cost of removal; applicability to Outer Continental Shelf Lands Act; payment of judgment.

(i) (1) In any case where an owner or operator of a vessel or an onshore facility or an offshore facility from which oil is discharged in violation of subsection (b) (2) of this section acts to remove such oil in accordance with regulations promulgated pursuant to this section, such owner or operator shall be entitled to recover the reasonable costs incurred in such removal upon establishing, in a suit which may be brought against the United States Government in the United States Court of Claims, that such discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether such act or omission was or was not negligent, or of any combination of the foregoing clauses.

(2) The provisions of this subsection shall not apply in any case where liability is established pursuant to the Outer Continental Shelf Lands Act.

(3) Any amount paid in accordance with a judgment of the United States Court of Claims pursuant to this section shall be paid from the fund established pursuant to subsection (k) of this section.

Issuance of rules and regulations consistent with the National Contingency Plan; compliance; imposition of civil penalties for violations; amount.

(j) (1) Consistent with the National Contingency Plan required by subsection (c) (2) of this section, as soon as practicable after April 3, 1970, and from time to time thereafter, the President shall issue regulations consistent with maritime safety and with marine and navigation laws (A) establishing methods and procedures for removal of discharged oil, (B) establishing criteria for the development and implementation of local and regional oil removal con-

tingency plans, (C) establishing procedures, methods, and requirements for equipment to prevent discharges of oil from vessels and from onshore facilities and offshore facilities, and (D) governing the inspection of vessels carrying cargoes of oil and the inspection of such cargoes in order to reduce the likelihood of discharges of oil from such vessels in violation of this section.

(2) Any owner or operator of a vessel or an onshore facility or an offshore facility and any other person subject to any regulation issued under paragraph (1) of this subsection who fails or refuses to comply with the provisions of any such regulation, shall be liable to a civil penalty of not more than \$5,000 for each such violation. Each violation shall be a separate offense. The President may assess and compromise such penalty. No penalty shall be assessed until the owner, operator, or other person charged shall have been given notice and an opportunity for a hearing on such charge. In determining the amount of the penalty, or the amount agreed upon in compromise, the gravity of the violation, and the demonstrated good faith of the owner, operator, or other person charged in attempting to achieve rapid compliance, after notification of a violation, shall be considered by the President.

Authorization of appropriations

(k) There is hereby authorized to be appropriated to a revolving fund to be established in the Treasury not to exceed \$35,000,000 to carry out the provisions of subsections (c), (i) and (l) of this section and section 1162 of this title. Any other funds received by the United States under this section shall also be deposited in said fund for such purposes. All sums appropriated to, or deposited in, said fund shall remain available until expended.

Administration of oil pollution control; delegation of authority by President; availability of appropriations; utilization of personnel, services, and facilities.

(l) The President is authorized to delegate the administration of this section to the heads of those Federal depart-

ments, agencies, and instrumentalities which he determines to be appropriate. Any moneys in the fund established by subsection (k) of this section shall be available to such Federal departments, agencies, and instrumentalities to carry out the provisions of subsections (c) and (i) of this section and section 1162 of this title. Each such department, agency, and instrumentality, in order to avoid duplication of effort, shall, whenever appropriate, utilize the personnel, services, and facilities of other Federal departments, agencies, and instrumentalities.

Enforcement of provisions

(m) Anyone authorized by the President to enforce the provisions of this section may, except as to public vessels, (A) board and inspect any vessel upon the navigable waters of the United States or the waters of the contiguous zone, (B) with or without a warrant arrest any person who violates the provisions of this section or any regulation issued thereunder in his presence or view, and (C) execute any warrant or other process issued by an officer or court of competent jurisdiction.

Jurisdiction and venue

(n) The several district courts of the United States are invested with jurisdiction for any actions, other than actions pursuant to subsection (i) (1) of this section, arising under this section. In the case of Guam, such actions may be brought in the district court of Guam, and in the case of the Virgin Islands such actions may be brought in the district court of the Virgin Islands. In the case of American Samoa and the Trust Territory of the Pacific Islands, such actions may be brought in the District Court of the United States for the District of Hawaii and such court shall have jurisdiction of such actions. In the case of the Canal Zone, such actions may be brought in the United States District Court for the District of the Canal Zone.

Existing liability for damages for oil discharge or removal not affected or modified; power of State or political subdivision thereof to impose requirements or liabilities for oil discharge not preempted; existing Federal, State, or local authority or law not affected or modified.

(o) (1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency under any provision of law for damages to any publicly-owned or privately-owned property resulting from a discharge of any oil or from the removal of any such oil.

(2) Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil into any waters within such State.

(3) Nothing in this section shall be construed as affecting or modifying any other existing authority of any Federal department, agency, or instrumentality, relative to onshore or offshore facilities under this chapter or any other provision of law, or to affect any State or local law not in conflict with this section.

Financial responsibility of vessels; amount; establishment; effective dates; administration of provisions; claim for costs against insurer; study and report on need for financial responsibility of vessels, and onshore and offshore facilities.

(p) (1) Any vessel over three hundred gross tons, including any barge of equivalent size, but not including any barge that is not self-propelled and that does not carry oil as cargo or fuel, using any port or place in the United States or the navigable waters of the United States for any purpose shall establish and maintain under regulations to be prescribed from time to time by the President, evidence of financial responsibility of \$100 per gross ton, or \$14,000,000 whichever is the lesser to meet the liability to the United States which such vessel could be subjected under this section. In cases where an owner or operator owns, op-

erates, or charters more than one such vessel, financial responsibility need only be established to meet the maximum liability to which the largest of such vessels could be subjected. Financial responsibility may be established by any one of, or a combination of, the following methods acceptable to the President: (A) evidence of insurance, (B) surety bonds, (C) qualification as a self-insurer, or (D) other evidence of financial responsibility. Any bond filed shall be issued by a bonding company authorized to do business in the United States.

(2) The provisions of paragraph (1) of this subsection shall be effective one year after April 3, 1970. The President shall delegate the responsibility to carry out the provisions of this subsection to the appropriate agency head within sixty days after April 3, 1970. Regulations necessary to implement this subsection shall be issued within six months after April 3, 1970.

(3) Any claim for costs incurred by such vessel may be brought directly against the insurer or any other person providing evidence of financial responsibility as required under this subsection. In the case of any action pursuant to this subsection such insurer or other person shall be entitled to invoke all rights and defenses which would have been available to the owner or operator if an action had been brought against him by the claimant, and which would have been available to him if an action had been brought against him by the owner or operator.

(4) The Secretary of Transportation, in consultation with the Secretaries of Interior, State, Commerce, and other interested Federal agencies, representatives of the merchant marine, oil companies, insurance companies, and other interested individuals and organizations, and taking into account the results of the application of paragraph (1) of this subsection, shall conduct a study of the need for and, to the extent determined necessary—

(A) other measures to provide financial responsibility and limitation of liability with respect to vessels using the navigable waters of the United States;

(B) measures to provide ~~financial~~ responsibility for all onshore and offshore facilities; and

(C) other measures for limitation of liability of such facilities;

for the cost of removing discharged oil and paying oil damages resulting from the discharge of such oil. The Secretary of Transportation shall submit a report, together with any legislative recommendations, to Congress and the President by January 1, 1971.

SUBMERGED LANDS ACT OF 1953

(Chapter 29)

Subchapter II.—Lands Beneath Navigable Waters Within State Boundaries.

§ 1311. Rights of the States—Confirmation and establishment of title and ownership of lands and resources; management, administration, leasing, development, and use.

(a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

Release and relinquishment of title and claims of the United States; payment to States of moneys paid under leases.

(b) (1) The United States releases and relinquishes unto said States and persons aforesaid, except as otherwise

reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources; (2) the United States releases and relinquishes all claims of the United States, if any it has, for money or damages arising out of any operations of said States or persons pursuant to State authority upon or within said lands and navigable waters; and (3) the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States shall pay to the respective States or their grantees issuing leases covering such lands or natural resources all moneys paid thereunder to the Secretary of the Interior or to the Secretary of the Navy or to the Treasurer of the United States and subject to the control of any of them or to the control of the United States on May 22, 1953, except that portion of such moneys which (1) is required to be returned to a lessee; or (2) is deductible as provided by stipulation or agreement between the United States and any of said States;

Leases in effect on June 5, 1950

(c) The rights, powers, and titles hereby recognized, confirmed, established, and vested in and assigned to the respective States and their grantees are subject to each lease executed by a State, or its grantee, which was in force and effect on June 5, 1950, in accordance with its terms and provisions and the laws of the State issuing, or whose grantee issued, such lease, and such rights, powers, and titles are further subject to the rights herein now granted to any person holding any such lease to continue to maintain the lease, and to conduct operations thereunder, in accordance with its provisions, for the full term thereof, and any extensions, renewals, or replacements authorized therein, or heretofore authorized by the laws of the State issuing, or whose grantee issued such lease: *Provided, however,* That, if oil or gas was not being produced from such lease on and before December 11, 1950, or if the primary term of such lease has expired since December 11, 1950, then for a term from May 22, 1953 equal to the term remaining unexpired on December 11, 1950, under the provisions of such lease or any extensions, renewals, or re-

placements authorized therein, or heretofore authorized by the laws of the State issuing, or whose grantee issued, such lease: *Provided, however,* That within ninety days from May 22, 1953 (i) the lessee shall pay to the State or its grantee issuing such lease all rents, royalties, and other sums payable between June 5, 1950, and May 22, 1953, under such lease and the laws of the State issuing or whose grantee issued such lease, except such rents, royalties, and other sums as have been paid to the State, its grantee, the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States and not refunded to the lessee; and (ii) the lessee shall file with the Secretary of the Interior or the Secretary of the Navy and with the State issuing or whose grantee issued such lease, instruments consenting to the payment by the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States to the State or its grantee issuing the lease, of all rents, royalties, and other payments under the control of the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States or the United States which have been paid, under the lease, except such rentals, royalties, and other payments as have also been paid by the lessee to the State or its grantee;

Authority and rights of the United States respecting navigation, flood control and production of power.

(d) Nothing in this chapter shall affect the use, development, improvement, or control by or under the constitutional authority of the United States of said lands and waters for the purposes of navigation or flood control or the production of power, or be construed as the release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation, or to provide for flood control, or the production of power;

Ground and surface waters west of the 98th meridian

(e) Nothing in this chapter shall be construed as affecting or intended to affect or in any way interfere with or

modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian, relating to the ownership and control of ground and surface waters; and the control, appropriation, use, and distribution of such waters shall continue to be in accordance with the laws of such States.

LIMITATION OF LIABILITY ACT

(Chapter 8)

§ 183. Amount of liability; loss of life or bodily injury; privity imputed to owner; "seagoing vessel"

(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

(b) In the case of any seagoing vessel, if the amount of the owner's liability as limited under subsection (a) of this section is insufficient to pay all losses in full, and the portion of such amount applicable to the payment of losses in respect of loss of life or bodily injury is less than \$60 per ton of such vessel's tonnage, such portion shall be increased to an amount equal to \$60 per ton, to be available only for the payment of losses in respect of loss of life or bodily injury. If such portion so increased is insufficient to pay such losses in full, they shall be paid therefrom in proportion to their respective amounts.

(c) For the purposes of this section the tonnage of a seagoing steam or motor vessel shall be her gross tonnage without deduction on account of engine room, and the tonnage of a seagoing sailing vessel shall be her registered

tonnage: *Provided*, That there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use.

(d) The owner of any such seagoing vessel shall be liable in respect of loss of life or bodily injury arising on distinct occasions to the same extent as if no other loss of life or bodily injury had arisen.

(e) In respect of loss of life or bodily injury the privity or knowledge of the master of a seagoing vessel or of the superintendent or managing agent of the owner thereof, at or prior to the commencement of each voyage, shall be deemed conclusively the privity or knowledge of the owner of such vessel.

(f) As used in subsections (b), (c), (d), and (e) of this section and in section 183b of this title, the term "seagoing vessel" shall not include pleasure yachts, tugs, tow-boats, towing vessels, tank vessels, fishing vessels or their tenders, self-propelled lighters, nondescript self-propelled vessels, canal boats, scows, car floats, barges, lighters, or nondescript non-self-propelled vessels, even though the same may be seagoing vessels within the meaning of such term as used in section 188 of this title.

Florida — Oil Spill Prevention and Pollution Control Act of 1970, Chapter 70-244, Laws of Florida (Fla. Stat. Ann. Chapter 376) is reproduced in the Appellant's Appendix, page 56.

ANNOTATED CODE OF MARYLAND, 1971 CUMULATIVE
SUPPLEMENT, ARTICLE 96A

Pollution Abatement

§ 23. Declaration of public policy and legislative intent.

Whereas the quality of the waters of this State is vital to the public and private interests of its citizens; and

Whereas pollution constitutes a menace to public health and welfare, creates public nuisances, is harmful to wildlife, fish and aquatic life, and impairs domestic, agricultural, industrial, recreational and other legitimate beneficial uses of water; and

Whereas the problem of water pollution in this State is closely related to the problem of water pollution in adjoining states; and

Whereas it is hereby declared to be the public policy of this State to improve, conserve and manage the quality of the waters of the State and to protect, maintain and improve the quality thereof for public water supplies, for the propagation of wildlife, fish and aquatic life, and for domestic, agricultural, industrial, recreational and other legitimate beneficial uses; to provide that no waste be discharged into any waters of the State without first receiving the necessary treatment or other corrective action to protect the legitimate beneficial uses of such waters; to provide for the prevention abatement and control of new or existing water pollution; and to cooperate with the agencies of other states and the federal government in carrying out these objectives; now, therefore

It is the intention of the General Assembly in the enactment of this subtitle to improve, conserve and manage the quality of the waters of the State. (1970, ch. 243.)

§ 24. Definitions.

For the purposes of this subtitle, the following words and phrases shall have the following meanings:

(a) "Pollution" means such contamination or other alteration of the physical, chemical or biological properties, of any waters of the State, including change in temperature, taste, color, turbidity, or odor of the waters, or such discharge or deposit of any organic matter, harmful organisms, liquid, gaseous, solid, radioactive, or other substance into any waters of the State as will render such waters harmful, detrimental or injurious to public health,

safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life.

(b) "*Wastes*" means industrial wastes and all other liquid, gaseous, solid or other substances which will pollute any waters of this State.

(c) "*Treatment works*" means any plant or other works, used for the purpose of treating, stabilizing or holding wastes.

(d) "*Disposal system*" means a system for disposing of wastes, either by surface or underground methods, and includes treatment works, disposal wells and other systems.

(e) "*Waters of the State*" means both surface and underground waters within the boundaries of the State or subject to its jurisdiction, including that portion of the Atlantic Ocean within the boundaries of the State, the Chesapeake Bay and its tributaries, the flood plain of free-flowing waters on the basis of a fifty (50) year flood frequency, and all ponds, lakes, rivers, streams, public ditches, tax ditches, and public drainage systems within the State, other than those designed and used for the purpose of collection, conveyance, or disposal of sanitary sewage.

(f) "*Person*" means the State or any agency or institution thereof, any municipality, political subdivision, public or private corporation, individual, partnership, association, or other entity, and includes any officer or governing or managing body of any municipality, political subdivision, or public or private corporation. (1970, ch. 243; 1971 ch. 197.)

§ 25. Powers and duties of Department.

The Department shall have and may exercise the following powers and duties:

(a) To exercise general supervision over the administration and enforcement of this subtitle and all rules, regulations and orders promulgated pursuant thereto;

- (b) To develop comprehensive programs for the prevention, control and abatement of pollution of the waters of the State;
- (c) To advise, consult, and cooperate with other agencies of the State, the federal government, other states and interstate agencies, and with affected groups, political subdivisions, and industries in furtherance of the purposes of this subtitle;
- (d) To accept and administer loans and grants from the federal government and from other sources, public or private, for carrying out any of its functions;
- (e) To encourage, participate in, finance, or conduct studies, investigations, research and demonstrations relating to water pollution and the causes, prevention, control, and abatement thereof;
- (f) To collect and disseminate information relating to water pollution and the prevention, control, and abatement thereof;
- (g) To adopt, modify, repeal and promulgate water quality standards for the waters of the State, and effluent standards for waters discharged into the waters of the State;
- (h) To adopt, modify, repeal, and promulgate, after due notice and hearing, and to enforce rules and regulations implementing or effectuating its powers and duties;
- (i) To issue, modify, or revoke orders (1) prohibiting discharges of wastes into the waters of the State; (2) requiring the construction, modification, extension or alteration of new or existing disposal systems or treatment works or parts thereof or the adoption of other reasonable remedial measures to prevent, control or abate pollution or undesirable changes in the quality of the waters of the State;
- (j) To hold hearings, to issue notices of hearing and subpoenas requiring the attendance of witnesses and the production of evidence, to administer oaths, and to take such

testimony as it deems necessary, and any of these powers may be exercised by the Director or by a hearing officer designated in writing by the Director;

(k) To require the prior submission of plans, specifications, and other data relative to, and to inspect the construction of, disposal systems or treatment works or any part thereof in connection with the issuance of permits or approvals as are required by this subtitle;

(l) To issue, continue in effect, revoke, modify, or deny, under such conditions as it may prescribe, permits for the discharge of waters or wastewaters into the waters of the State, and for the installation, modification, or operation of disposal systems or any parts thereof;

(m) To require proper maintenance and operation of disposal systems;

(n) To exercise all incidental powers necessary to carry out the purposes of this subtitle. (1970, ch. 243.)

§ 26. Polluting or contaminating State waters; activities requiring permit from Department.

(a) It shall be unlawful for any person: (1) to cause pollution of any waters of the State or to place or cause to be placed any wastes in a location where they are likely to cause pollution of any waters of the State; or (2) to discharge any wastes into any waters of the State which would violate effluent standards or reduce the quality of such waters below the water quality standards established therefor by the Department. Any such action is hereby declared to be a public nuisance.

(b) Subject to the provisions of § 29 (c) of this subtitle, it shall be unlawful for any person to carry on any of the following activities unless he holds a current permit therefor from the Department for the disposal of all wastes or waters which are or may be discharged thereby into the waters of the State: (1) the discharge of any waters or wastewaters into the waters of the State in violation of regulations promulgated by the Department; (2) the construction, installation, modification, extension, alteration

or operation of any disposal system or part thereof; (3) the increase in volume, temperature or strength of any wastes in excess of the permissive discharges specified under any existing permit; (4) the construction, installation, or operation of any industrial, commercial, or other establishment or any extension or modification thereof or addition thereto, the operation of which would cause an increase in the discharge of wastes into the waters of the State or otherwise alter the physical, chemical, or biological properties of any waters of the State in any manner not already lawfully authorized; (5) the construction or use of any new outlet for the discharge of any wastes into the waters of the State.

The Department may require the submission of such plans, specifications, and other information as it deems necessary to carry out the provisions of this subtitle or to carry out the rules and regulations adopted pursuant to the provisions of this subtitle. (1970, ch. 243; 1971, ch. 197.)

§ 26A. Regulation of transfer, storage, etc., of oil and other unctuous substances.

The Department of Water Resources shall prescribe by regulation approved methods, facilities, standards, and devices for the transfer, storage, separating, removing, treating, and disposing of oil and other unctuous substances for the purpose of preventing pollution of waters of the State. No person shall engage in any commercial or industrial operation involving these activities unless approval is received from the Department in the form of a permit, indicating that the activities are in conformity with the prescribed regulations; but persons engaged in commercial or industrial operations involving these activities prior to June 30, 1971, may have until July 1, 1972, to obtain a permit. (1971, ch. 656.)

§ 27. Water quality and effluent standards.

(a) The Department may set water quality and effluent standards to be applicable to the waters of this State or portions thereof. The standards shall be such as to protect the public health, safety and welfare and the present and

future use of such waters for public water supply, the propagation of fish and other aquatic life and wildlife, recreational purposes, and agricultural, industrial, and other legitimate uses. Such standards may be amended from time to time by the Department.

(b) Prior to establishing, amending, or repealing water quality or effluent standards the Department shall, after due notice, conduct public hearings thereon. Notice of public hearings shall specify the waters for which standards are sought to be adopted, amended, or repealed and the time, date, and place of the hearing. (1970, ch. 243.)

§ 28. Procedure upon violations.

(a) *Complaint to be served upon alleged violator; options then available to Department.* — Whenever the Department has reason to believe that a violation of any provision of this subtitle or of any regulation of the Department has occurred, it shall cause a written complaint to be served upon the alleged violator or violators. The complaint shall specify the provision of law or regulation alleged to be violated, and the facts alleged to constitute a violation thereof.

Subsequent to or concurrent with service of the complaint as provided in subsection (c) of this section, the Department may exercise one of the following options:

(1) The Department may issue an order requiring that necessary corrective action be taken within the time prescribed in such order. Any person or persons named in the order may request in writing a hearing before the Department no later than ten (10) days after the date such order is served, in which case a hearing shall be scheduled within ten (10) days from receipt of such request and a decision shall be rendered within ten (10) days from the date of the hearing.

(2) The Department may require that the alleged violator file a written report regarding the alleged violation.

(3) The Department may require that the alleged violator appear before the Department at a time and place

specified by the Department and answer the charges outlined in the complaint.

(4) The Department may require that the alleged violator file a written report regarding the alleged violation and appear before the Department at a time and place specified by the Department and answer the charges outlined in the complaint.

If the Department exercises the option provided by paragraph (2) of this subsection, the alleged violator or violators may request in writing a hearing before the Department no later than ten (10) days after the date that notice of the requirement of the written report is served. The appearance of the alleged violator or violators before the Department under the options provided by paragraph (3) or (4) of this subsection shall be an administrative hearing, and the parties in all hearings conducted under this subsection shall have the rights of parties in contested cases provided in §§ 251 and 252 of Article 41 of this Code.

If the Department exercises the option provided by paragraphs (2), (3), or (4) of this subsection, the Department shall not issue an order requiring corrective action to be taken as a result of the alleged violation before the expiration of the time set for the filing of any report and the holding of any hearing required pursuant to this subsection. Thereafter, the Department may issue an order requiring that necessary corrective action be taken within such time as prescribed in such order, and no person shall be entitled to a hearing before the Department as a result of such order.

Notice of a hearing or of a requirement that a written report be filed shall be served on the alleged violator in accordance with the provisions of subsection (c) of this section not less than ten (10) days before the time set for the hearing or for the filing of a report.

All orders issued by the Department pursuant to the provisions of this section shall be served on the person or persons affected thereby in accordance with the provisions

of subsection (c) of this section, and upon service shall become immediately effective according to their terms.

(b) *Judicial review of departmental order.* — Persons aggrieved by an order issued hereunder shall not have the right to appeal to the board of review of the Department of Natural Resources as provided in § 237 of Article 41 of this Code, but may obtain immediate judicial review pursuant to the provisions of §§ 255 and 256 of Article 41 of this Code and the Maryland Rules of Procedure.

(c) *Manner of service of notices, orders, etc.* — Except as otherwise expressly provided, any notice, order, or other instrument issued by or under authority of the Department may be served on any person affected thereby personally or by publication, and proof of such service may be made in like manner as in case of service of process in a civil action, such proof to be filed in the office of the Department; or such service may be made by mailing a copy of the notice, order, or other instrument by certified or registered mail, directed to the person affected at his last known post-office address as shown by the files or records of the Department, and proof thereof may be made by the sworn statement or affidavit of the person who did the mailing, filed in the office of the Department.

(d) *Record of hearings; witnesses' fees and mileage; court order requiring appearance, etc., at hearing.* — A verbatim record of the proceedings of hearings may be taken when deemed necessary or advisable by the Department. Witnesses who are subpoenaed shall receive the same fees and mileage as in civil actions. In case of refusal to obey a notice of hearing or subpoena issued under this section, any circuit court shall have jurisdiction upon application of the Department, to issue an order requiring such person to appear and testify or produce evidence as the case may require and any failure to obey such order of the court may be punished by such court as contempt. (1970, ch. 243.)

§ 28A. Violations and penalties.

(a) *Generally.* — Any person who shall violate any of the provisions of, or who fails to perform any duty im-

posed by, this subtitle or regulation issued hereunder or who violates any order of the Department made pursuant to this subtitle shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by fine of not more than ten thousand dollars (\$10,000.00) or by imprisonment not to exceed one (1) year, or both, and in addition thereto may be enjoined from continuing such violation. Each day upon which such violation occurs shall constitute a separate offense.

(b) *Duty of Attorney General to prosecute or bring action for injunction; finding of Department deemed prima facie evidence in injunction proceedings.* — It shall be the duty of the Attorney General on the request of the Department to prosecute such criminal cases or to bring an action for an injunction against any person violating the provisions of this subtitle, or violating any valid order of the Department. In any action for an injunction brought pursuant to this section, any finding of the Department after hearing shall be prima facie evidence of the fact or facts found therein.

(c) *Grounds for injunction.* — Upon a showing by the Attorney General in behalf of the Department that any person is violating or is about to violate the provisions of this subtitle or is violating or is about to violate any valid order of the Department, an injunction shall be granted without the necessity of showing a lack of adequate remedy at law.

(d) *Order to correct violations; compliance therewith within one year; extension of time for compliance.* — In any case where a violation of any provision of this subtitle has occurred and the existence of such violation has been finally determined, the Department shall promptly issue an order requiring the correction of each violation found to have occurred, and the Department shall secure compliance with the provisions of such order within one (1) year from the date of service thereof on the violator. If the violation has not been corrected and a plan for compliance submitted by the violator has not been approved by the Department within the aforementioned one-year

period, the violation shall be referred to the Attorney General immediately after the expiration of the one-year period, who shall thereupon, and in addition to any other actions which he may have taken or which he may elect to take against the violator, take appropriate legal action to require correction of the violation. Nothing in this subsection shall be construed to prevent the Attorney General or the Department from taking action against the violator before the expiration of the aforementioned one-year period. Any court having jurisdiction of an action for an injunction brought under the provisions of this subtitle shall have the discretion, based upon the particular facts of each case, to extend the time period allowed for the correction of a violation for one or more additional one-year periods. (1970, ch. 243.)

§ 28B. Construction and purpose of subtitle; remedies additional and cumulative.

This subtitle shall not be construed as repealing any law of the State relating to the pollution of waters thereof or any conservation laws, but shall be held and construed as auxiliary and supplementary thereto, except to the extent that the same are in direct conflict herewith. It is the purpose of this subtitle to provide additional and cumulative remedies to prevent, abate, and control the pollution of the waters of the State. Nothing herein contained shall be construed to abridge or alter rights of action or remedies in equity or under existing common law or statutory law, criminal or civil, nor shall any provision of this subtitle, or any act done by virtue thereof, be construed as estopping the State, or any person, as riparian owners or otherwise in the exercise of their rights in equity or under the common law or statutory law to suppress nuisances or to abate pollution. (1970, ch. 243.)

§ 29. Vessels discharging oil.

(a) *Prohibited; exceptions; "oil" defined.* — Except in case of emergency imperiling life or property, or unavoidable accident, collision, or stranding, it shall be unlawful for any person to discharge or permit the discharge of oil

in any manner into or upon the waters within the jurisdiction of the State of Maryland from any vessel, ship, or boat of any kind.

The term "oil" shall mean any of a large class of unctuous substances of vegetable, animal or mineral origin, which are liquid or at least easily liquefiable on warming and soluble in ether but not in water.

(a-1) *Duty to report discharge.* — Notwithstanding any of the provisions of this subtitle, any person discharging or permitting the discharge of oil, or any person either actively or passively participating in the discharge or spilling of oil, into the waters of the State either from a land-based installation, including vehicles in transit, or from any vessel, ship or boat of any kind, shall not knowingly fail to report the incident immediately to the appropriate federal authority and/or the State Department of Water Resources and shall not knowingly fail to remain available until clearance to leave is given by the appropriate officials.

(b) *Penalty for violation of subsection (a) or (a-1); pecuniary liability of vessel.* — Any person who violates subsections (a) or (a-1) of this section is guilty of a misdemeanor, and upon conviction shall be punished by a fine or by imprisonment or by both fine and imprisonment, for each offense as provided in § 28A of this article. And any vessel from which oil is discharged in violation of subsection (a), shall be liable for the pecuniary penalty as specified in this section, and clearance of such vessel from a port of the State may be withheld until the penalty is paid, and said penalty shall constitute a lien on such vessel.

(c) *Administration and enforcement of section.* — In the administration of this section the Department may make use of the organization, equipment, and agencies, including engineering, clerical and other personnel, employed in the improvement and preservation of waters and natural resources of the State of Maryland in the enforcement of laws for the preservation and protection of the waters and natural resources of the State of Maryland. And for the better enforcement of the provisions of this section, all

persons authorized by law of this State to make arrests shall have the power and it shall be their duty to swear out process and to arrest and take into custody, with or without process, any person who may violate any of said provisions; provided, that no person shall be arrested without process for a violation not committed in the presence of some one of the aforesaid officials; and provided further, that whenever any arrest is made under the provisions of the said section the person so arrested shall be brought forthwith before a magistrate, judge, or court of the State for examination of the offenses alleged against him; and such magistrate, judge, or court shall proceed in respect thereto as authorized by law in cases of crimes against the State of Maryland.

(d) *Notice to Department of violations.* — Whenever any person, or ship is accused of violating the provisions of this section, it shall be the duty of the arresting officer to notify the Department forthwith in writing, for the purpose of permitting it to take any steps in the proceeding that it may deem advisable. The provisions of this subsection are intended to be directory only.

(e) *Construction of section.* — This section shall be in addition to the laws existing prior to June 1, 1949, for the preservation and protection of waters of the Chesapeake Bay and its tributaries and shall not be construed as repealing, modifying, or in any manner affecting the provisions of those laws. (1970, ch. 243; 1971, ch. 651.)

§ 29A. Development of program to respond to emergency oil spillage.

The responsibility of developing a program, including training, which would enable the State to respond to an emergency oil spillage in Maryland waters is that of the Maryland Port Authority in the Baltimore Harbor area and of the Department of Natural Resources in other waters of the State. These agencies shall coordinate the efforts of the various State and local agencies aiding in the operation and request the aid of the appropriate federal agencies if necessary. (1970, ch. 243.)

§ 29AB. Bond required of vessels entering to discharge or receive oil cargo.

(a) Except for a vessel carrying or receiving twenty-five (25) barrels of oil or less, any vessel, whether or not self-propelled, in or entering upon the waters of the State for the purpose of discharging or receiving a cargo of any bulk oil in the State shall post a bond with the Maryland Port Authority or the Department of Natural Resources of at least one hundred dollars (\$100.00) per gross ton of oil cargo to the State. The bond shall be in a form approved by the Authority and the Department and may be obtained individually or jointly by the vessel, its owner or agent, its charterer, or by the owner or operator of the terminal at which the vessel discharges or receives the bulk oil. If the Authority or the Department determines that oil has been discharged or spilled into the waters of the State from the vessel, the bond shall be forfeited, to the extent of the costs incurred by the Authority or the Department in eliminating the residue of the oil discharge or spillage, to the extent of damage caused to the natural and recreational resources of the State, and to the extent of any otherwise uncollectible fines levied against the vessel, its owner or agent, its charter, or the owner or operator of the terminal at which the vessel discharges or receives the bulk oil. The remedies provided in this section shall be in addition to all other remedies available. No bond shall be released without certification by the Authority or the Department that the vessel has not been a source of oil discharge or spillage into the waters of the State. Where a vessel has presented adequate evidence of financial responsibility to the federal government, it shall be exempt from the Maryland provisions requiring the posting, and forfeiture, on certain conditions of a bond.

(b) Any vessel in the waters of the State for the purpose of discharging, or which receives, cargo of bulk oil without being bonded as provided in subsection (a) of this section, and the owner, agent, and charterer thereof, and the owner or operator of the terminal at which the vessel discharges or receives bulk oil without being so bonded, shall be pun-

ished by a fine of not more than five thousand dollars (\$5,000.00). (1971, ch. 504.)

§ 29B. Compensatory fee for oil spillage.

The Maryland Port Authority and the Department of Natural Resources shall charge and collect a compensatory fee from the person responsible for the oil spillage. This fee shall cover the cost of labor, equipment operation, and materials necessary to eliminate the residue of oil spillage and the cost of restoring areas damaged by the spillage to their original condition and said fee shall be retained by the agency charging the fee. (1970, ch. 243; 1971, ch. 504.)

§ 29BC. Liability for damages caused by oil spillage.

The person responsible for the oil spillage shall be liable to any other person for any damages to his real or personal property directly caused by the spillage. (1971, ch. 504.)

§ 29C. Effect of subtitle on jurisdiction of State Department of Health and Mental Hygiene.

Nothing in this subtitle shall be construed to alter, change, modify or restrict the jurisdiction of the State Department of Health and Mental Hygiene as set forth in this Code. (1970, ch. 243.)

§ 29D. Investigation of damage to aquatic resources; suit against persons liable for damage.

(a) Whenever there occurs in the waters of the State any condition indicative of damage to aquatic resources, including, but not limited to, mortality of fish and other aquatic life, it shall be the duty of the Department of Natural Resources to investigate the occurrence, to determine the nature and extent of the occurrence, and to endeavor to establish the cause and source of the occurrence. The Department of Natural Resources shall act on these findings, as hereinafter provided, to require the repair of any damage done and the restoration of water resources to a degree necessary to protect the best interests of the people of the State.

(b) The Department of Natural Resources, if it believes the institution of suit to be advisable, shall turn over to

the Attorney General all pertinent information and data. The Attorney General thereupon shall file suit against the person or persons causing the condition complained of, who shall be jointly and severally liable for the reasonable cost of rehabilitation and restoration of the resources damaged and the cost of eliminating the condition causing the damage. (1970, ch. 243.)

CHAPTER 356

LAWS OF MARYLAND OF 1972

(Senate Bill 12)

AN ACT to add new Sections 29E through 29G inclusive to Article 96A of the Annotated Code of Maryland (1964 Replacement Volume and 1971 Supplement), title "Water Resources", said new sections to follow immediately after Section 29D thereof, and to be under the new subtitle "Oil Discharge Containment, Control and Clean-up", granting the Department of Natural Resources the authority to license oil terminal facilities; establishing a system of licensing and fees therefor; creating the Maryland Oil Disaster Containment, Clean-up and Contingency Fund, in order to develop and provide the equipment, personnel, and plans to respond and contain damage caused by the discharge of oil, petroleum products, and their by-products, into the lands and waters of this State, to contain and remove these discharges, to provide for restoration of damaged resources, and to require reimbursement to the fund of the cost of such containment, clean-up, removal and restoration; to provide for criminal sanctions; and matters generally relating thereto.

SECTION 1. *Be it enacted by the General Assembly of Maryland,* That new Sections 29E through 29G inclusive be and are hereby added to Article 96A of the Annotated Code of Maryland (1964 Replacement Volume and 1971 Supplement), title "Water Resources", said new sections to follow immediately after Section 29D thereof and to be

under the new subtitle "Oil Discharge Containment, Control and Clean-up", and to read as follows:

**Oil Discharge Containment, Control and Clean-Up
29E.**

The following words and phrases as used in this subtitle, unless a different meaning is plainly required by context, have the following meaning:

- (1) "Department" means the State Department of Natural Resources.
- (2) "Discharge" means any spilling, leaking, pumping, pouring, emitting, emptying, or dumping.
- (3) "Fund" means the Maryland Oil Disaster Containment, Clean-Up and Contingency Fund.
- (4) "Oil, petroleum products, and their by-products" means oil of any kind and in any liquid form including, but not limited to, petroleum, fuel oil, sludge, oil refuse, oil mixed with other wastes, crude oils and all other liquid hydrocarbons regardless of specific gravity.
- (5) "Oil terminal facility" means any facility of any kind and related appurtenances receiving, transferring or discharging oil, petroleum products and their by-products to or from any commercial vessel, tank truck, tank car or any other vehicle used for transporting the same in the State of Maryland and having a total storage capacity in excess of 3,000 barrels.
- (6) "Operate or operator" means any person owning or operating an oil terminal facility whether by lease, contract, or any other form of agreement.
- (7) "Person" means individual, partnership, joint venture corporation, or any group of the foregoing organized or united for a business purpose.
- (8) "Total storage capacity" means the aggregate capacity available for the storage of oil, petroleum products, and their by-products at an oil terminal facility.

(9) "Barrel" means any measure of petroleum product or their by-products which consists of 42.0 U.S. gallons of liquid measure.

29F.

(a) No person shall operate or cause to be operated an oil terminal facility as described in this subtitle without a license.

(b) Licenses required under this subtitle shall be secured from the Department subject to terms and conditions set forth in this subtitle, and by paying an annual fee according to the following schedule using the total storage capacity at an oil terminal facility as an indicator of the utilization, impact, and possible hazards to the natural resources of Maryland:

<i>License Designation</i>	<i>Total Storage Capacity in Barrels</i>	<i>Annual License Fee</i>
Class A	50,000 or greater	\$5,000.00
Class B	20,000 to less than 50,000	1,500.00
Class C	10,000 to less than 20,000	1,000.00
Class D	5,000 to less than 10,000	500.00
Class E	Less than 5,000 but greater than 3,000	250.00

The annual fee shall be no less than \$250.00 nor greater than \$5,000, provided, however, that the maximum paid by any one person shall not exceed \$25,000. At the time the fund reaches its maximum of \$500,000, collection of the annual license fees shall be abated. Annual fees shall be paid by these facilities to the State Comptroller and upon receipt by him credited to the Maryland Oil Disaster Containment, Clean-up and Contingency Fund. Annual fees shall be paid by these facilities by no later than September 1, for the fiscal year beginning July 1 immediately preceding. In no event shall the collection of license fees for any one year exceed the sum of \$250,000; if such a contingency should occur, that excess over \$250,000 shall be credited or refunded to the licensees on a prorated basis.

(c) As a condition precedent to the issuance or renewal of a license the Department shall require satisfactory evidence that the applicant has implemented or is in the process of implementing state and federal plans and regulations for control of pollution related to oil, petroleum products, and their by-products and the abatement thereof when a discharge occurs.

(d) Any person who violates subsections (a) through (c) of this section is guilty of a misdemeanor and upon conviction shall be punished by fine of not less than \$500.00 nor more than \$10,000.00.

29G.

(a) The Maryland Oil Disaster Containment, Clean-up and Contingency Fund is established, to be used by the Department of Natural Resources for the purposes of development of equipment, personnel and plans; and for contingency actions to respond to, contain, clean up and remove from the land and waters of the State discharges of oil, petroleum products and their by-products into, upon or adjacent to the waters of the State; and to restore natural resources damaged by such discharges. The cost of containment, clean-up, removal and restoration shall be reimbursed the State by the person responsible for the discharge and this reimbursement shall be credited to the fund. The fund shall be limited to the sum of \$500,000.00. To this sum shall be credited all license fees, penalties, and other charges related to this subtitle, and to this fund shall be charged any and all expenses of the Department of Natural Resources related to this subtitle. At the time that the balance in the fund reaches the limit, license fees shall be temporarily abated or adjusted pursuant to § 29F(b).

(b) Moneys in the fund not needed currently to meet the obligations of the Department in the exercise of its responsibilities under this subtitle shall be deposited with the Treasurer of the State to the credit of the fund and may be invested as provided by statute. Interest received

on the investment shall be credited to the Maryland Oil Disaster Containment, Clean-up and Contingency Fund.

(c) The Secretary of Natural Resources shall determine the proper allocation of the monies credited to the Maryland Oil Disaster Containment, Clean-up and Contingency Fund for the following purposes and no others:

(1) Administrative expenses, personnel expenses, and equipment costs of the Department related to the purposes of this subtitle.

(2) Prevention, control, containment, clean-up and removal of discharges into, upon or adjacent to the waters of the State of discharges of oil, petroleum products and their by-products, and the restoration of natural resources damaged by such discharges.

(3) Development of containment and clean-up equipment, plans and procedures in accordance with the purposes of this section.

(4) Payment of costs of insurance by the State to extend or implement the benefits of the fund.

SEC. 2. *And be it further enacted*, That this Act shall take effect July 1, 1972.

COPY

SUPREME COURT, U. S.
FILED

JUN 13 1972

MICHAEL ROSAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-1082

REUBIN O'D. ASKEW, et al.,
Appellants,

-vs-

THE AMERICAN WATERWAYS
OPERATORS, INC., et al.,
Appellees.

On Appeal from the United States District Court
for the Middle District of Florida

AMICUS CURIAE BRIEF
OF THE STATE OF NORTH CAROLINA

ROBERT MORGAN
Attorney General

Thomas E. Kane
Ocean Law Consultant

Christine Y. Denson
Assistant Attorney General
Post Office Box 629
Raleigh, North Carolina 27602

Telephone (919) 829-4618

TABLE OF AUTHORITIES

Cases:

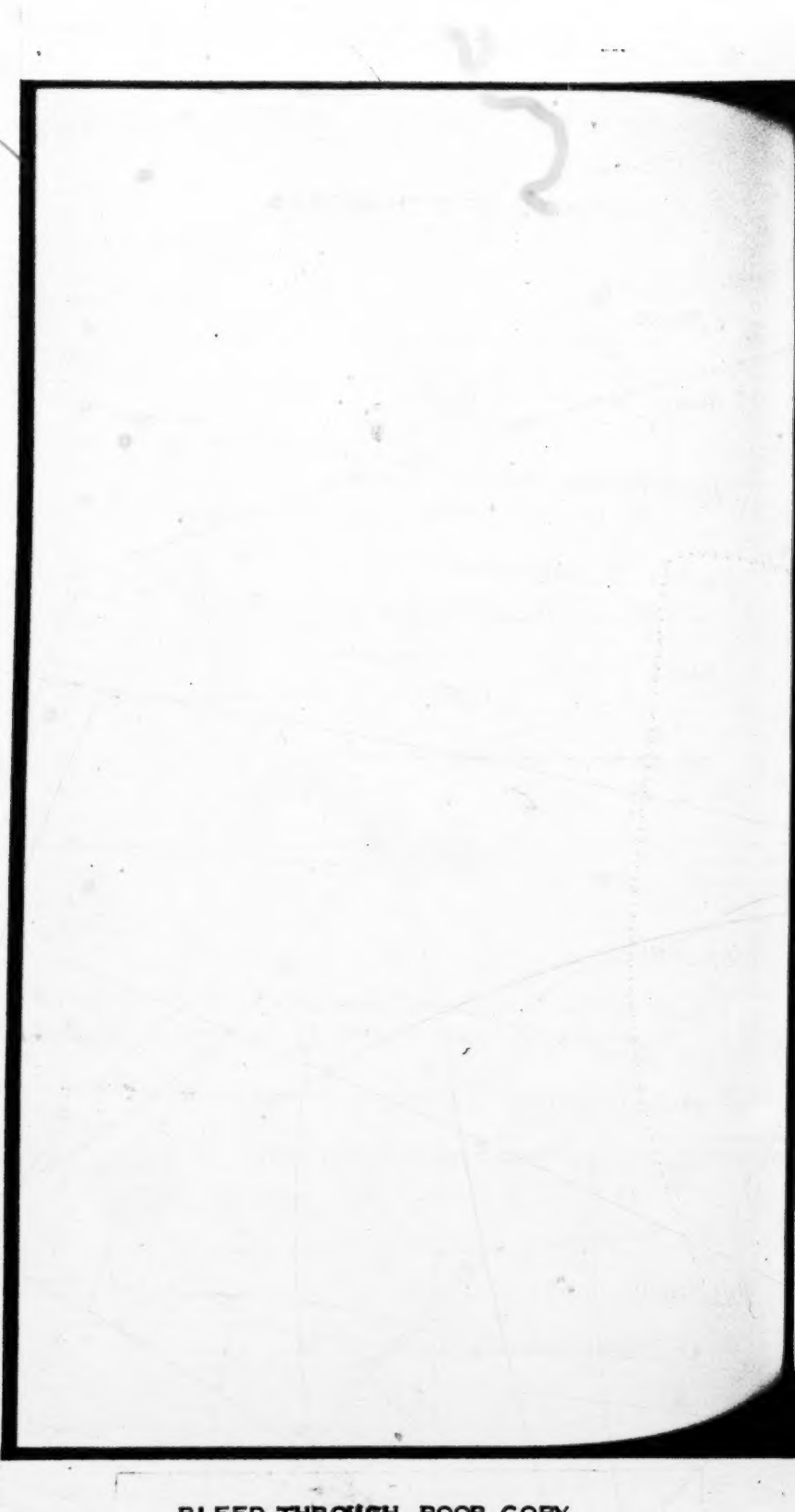
<i>California v. Zook</i> , 336 U.S. 725 (1949)	4
<i>Head v. New Mexico Board</i> , 374 U.S. 424 (1963)	4
<i>Huron Portland Cement v. Detroit</i> , 362 U.S. 440 (1960)	3, 6
<i>Kelly v. Washington</i> , 302 U.S. 1 (1937)	4, 5, 6
<i>Reid v. Colorado</i> , 187 U.S. 137 (1902)	5
<i>The American Waterways Operators, Inc. v. Askew</i> , 335 F. Supp. 1241 (M.D. Fla. 1971)	4

Federal Statutes:

Water Pollution Control Act Amendments of 1956, 33 U.S.C. § 1151	5
33 U.S.C. § 1160	6
Water Quality Improvement Act of 1970, 33 U.S.C. § 1161	4

State Statutes:

Ch. 70-244, Laws of Florida, 1970	3
---	---



BLEED THROUGH FROM COPY

Miscellaneous:

Conference Report No. 91-940, 1970,
U.S. Cong. & Admin. News, p. 2727 5

National Estuary Study, U.S. Dept. of
Interior, Vol. 3, App. B, January 1970 2

CONFIDENTIAL

Conference Report No. 11-10-1970

U.S. Civil & Admin. Serv. 1970

National Estab. 20-10-1970

Internal Vol. 1-10-1970

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-1082

REUBIN O'D. ASKEW, et al.,
Appellants,

-VS-

THE AMERICAN WATERWAYS
OPERATORS, INC., et al.,
Appellees.

On Appeal from the United States District Court
for the Middle District of Florida

AMICUS CURIAE BRIEF
OF THE STATE OF NORTH CAROLINA

INTEREST OF AMICUS CURIAE

The State of North Carolina has a general coastline (bordering the Atlantic Ocean) extending approximately 301 miles from Virginia to South Carolina. This, however, is less than 10 percent of the total tidal coastline in North Carolina. According to the United States Department of Commerce, North Carolina has 3,375 miles of tidal shoreline. This shoreline surrounds the many bays, sounds, and rivers of North Carolina and encompasses 2,200,000 acres of estuaries that are vital to marine organisms.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1911

No. 11-1062

REUBEN O. ASKEW, et al.,
Appellants,

-vs-

THE AMERICAN WATERWAYS
CORPORATION, INC., et al.,
Appellees.

On Appeal from the United States District Court
for the Middle District of Florida.

AMERICAN CUSTODY BRIEF
OF THE STATE OF NORTH CAROLINA

INTEREST OF AMERICAN CUSTODY

The State of North Carolina has a long maritime frontage
on the Atlantic Ocean, extending approximately 107 miles from
Wilmington to Swains River. This frontage is less than 10 percent
of the total frontage of the United States. According to the
United States Department of Commerce, North Carolina has 5,772
miles of tidal frontage. The commerce conducted in the many bays,
sounds, and rivers of North Carolina and surrounding 2,000,000
tons of commerce from the State of North Carolina.

The United States Department of the Interior was directed by the Estuarine Areas Act of 1968 (16 U. S. C. § 1221 *et seq.*) to study the nation's estuaries to evaluate, among other things, their value as ecosystems. One area studied was the Pamlico-Albemarle-Currituck Sound complex of North Carolina which takes in over 2,000,000 acres, or 90 percent, of North Carolina's estuaries. The report which resulted from that study estimated that:

"(A)bout 60 percent of all the United States' commercial finfish and shellfish and most marine sport fish inhabit estuaries during all or part of their life cycles. *This estuary is even more important to the North Carolina commercial fishery.* Estimates indicate that about 90 percent of the State's commercial finfish and shellfish harvest is dependent upon estuarine environments." *National Estuary Study*, U. S. Dept. of Interior, Vol. 3, App. B, pp. 112-144. (*Emphasis supplied.*)

The report further stated that this area (both land and water) studied was one of the largest relatively unspoiled natural areas on the eastern coast of the United States.

The two principal industries of eastern North Carolina are commercial fishing and recreation, which includes sport fishing, hunting, bathing, boating, and related activities. These activities all depend upon the favorable conditions of the North Carolina estuaries and the adjacent private and public lands, which in turn directly affect the economy of the State.

Thus North Carolina's interest in protecting its estuaries from deleterious substances is by no means slight. It is basic to the interests of the people it is charged to represent. The damage which can result from oil pollution could be disastrous to the commercial and sport fishing industries (not only because of its effects on the estuarine water itself, but also its effects on the marshlands, oyster beds and mud flats on which these fisheries so vitally depend) and to the recreational beaches of the State.

North Carolina, therefore, has considerable concern over the issues involved in this cause and believes that it has a legitimate

The United States Department of the Interior was directed
the Geological Survey, and in 1905 it was directed to
study the national geology and to make a general map of the
country. The national geology was then divided into three
parts: a general geology, a detailed geology, and a
geological atlas. The general geology was the first to be
published, and it was in 1905 that the first volume of the
geological atlas was published. The detailed geology was
published in 1906, and the geological atlas was published
in 1907.

(A) The general geology of the United States
was published in 1905, and it was the first of a series
of general geologies of the United States. It was
published by the Geological Survey, and it was
the first of a series of general geologies of the
United States. It was published by the Geological
Survey, and it was the first of a series of
general geologies of the United States. It was
published by the Geological Survey, and it was
the first of a series of general geologies of the
United States.

The general geology of the United States was published
in 1905, and it was the first of a series of
general geologies of the United States. It was
published by the Geological Survey, and it was
the first of a series of general geologies of the
United States.

The general geology of the United States was published
in 1905, and it was the first of a series of
general geologies of the United States. It was
published by the Geological Survey, and it was
the first of a series of general geologies of the
United States.

The general geology of the United States was published
in 1905, and it was the first of a series of
general geologies of the United States. It was
published by the Geological Survey, and it was
the first of a series of general geologies of the
United States.

The general geology of the United States was published
in 1905, and it was the first of a series of
general geologies of the United States. It was
published by the Geological Survey, and it was
the first of a series of general geologies of the
United States.

interest in the substantial questions raised by the ruling of the three-judge panel of the United States District Court for the Middle District of Florida.

QUESTION PRESENTED

WHETHER CONGRESS BY THE ENACTMENT OF THE WATER QUALITY IMPROVEMENT ACT OF 1970 INTENDED TO PREEMPT THE STATE'S POLICE POWER OVER THE CONTROL AND PREVENTION OF WATER POLLUTION BECAUSE THE STATE ACTION MAY AFFECT MARITIME ACTIVITIES?

ARGUMENT

The United States District Court for the Middle District of Florida declared that Florida's Oil Spill Prevention and Pollution Control Act (Ch. 70-244, Laws of Florida, 1970) was unconstitutional because the Federal government has exclusive jurisdiction in the area of substantive maritime law and the Florida act infringed into this area of exclusive Federal jurisdiction. The State of North Carolina believes this was error and would state its position on the basis of two additional questions: (1) Can the states act in the area of maritime law? and (2) Did Congress preempt the field relative to oil pollution?

The State of North Carolina believes that the first question must be answered in the affirmative. In *Huron Portland Cement v. Detroit*, 362 U. S. 440 (1960), this Court addressed itself to whether a local air pollution ordinance which was applied to vessels tied to a dock in the City of Detroit was constitutional and said at p. 442:

"The ordinance was enacted for the manifest purpose of promoting the health and welfare of the city's inhabitants. Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power. In the exercise of that power, *the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities,*

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED
DATE 08-01-2001 BY 60322 UCBAW/SJS

DECLASSIFICATION AUTHORITY

THIS DOCUMENT CONTAINS INFORMATION THAT IS
EXCLUDED FROM AUTOMATIC DECLASSIFICATION
BECAUSE IT IS A SOURCE OF INFORMATION
WHICH IS OF VALUE TO THE NATIONAL DEFENSE
AND THE DISCLOSURE OF WHICH COULD BE
DAMAGEFUL TO THE NATIONAL DEFENSE

EXEMPTION CODE

1. EXEMPTION CODE: 25X(1)
2. EXEMPTION CODE: 25X(2)
3. EXEMPTION CODE: 25X(3)
4. EXEMPTION CODE: 25X(4)
5. EXEMPTION CODE: 25X(5)
6. EXEMPTION CODE: 25X(6)
7. EXEMPTION CODE: 25X(7)
8. EXEMPTION CODE: 25X(8)
9. EXEMPTION CODE: 25X(9)
10. EXEMPTION CODE: 25X(10)

11. EXEMPTION CODE: 25X(11)
12. EXEMPTION CODE: 25X(12)
13. EXEMPTION CODE: 25X(13)
14. EXEMPTION CODE: 25X(14)
15. EXEMPTION CODE: 25X(15)
16. EXEMPTION CODE: 25X(16)
17. EXEMPTION CODE: 25X(17)
18. EXEMPTION CODE: 25X(18)
19. EXEMPTION CODE: 25X(19)
20. EXEMPTION CODE: 25X(20)

concurrently with the federal government. *Gibbons v. Ogden*, 9 Wheat. 1; *Cooley v. Board of Wardens of Port of Philadelphia*, 12 How. 299; *The Steamboat New York v. Rea*, 18 How. 223; *Morgan v. Louisiana*, 118 U. S. 455; *The Minnesota Rate Cases*, 230 U. S. 352; *Wilmington Transp. Co. v. California Railroad Comm.*, 236 U. S. 151; *Vandalia R. Co. v. Public Service Comm.*, 242 U. S. 255; *Stewart & Co. v. Rivara*, 274 U. S. 614; *Welch Co. v. New Hampshire*, 306 U. S. 79. (*Emphasis supplied.*)

In view of this clear statement and the many decisions by this Court cited, *supra*, exemplifying other areas in which the police power was held to justify regulation of interstate and maritime commerce, North Carolina contends it was error for the United States District Court for the Middle District of Florida to base its decision that the Florida law is unconstitutional on the grounds that "substantive maritime law . . . is exclusively within the Federal domain." *The American Waterways Operators, Inc. v. Askew*, 335 F. Supp. 1241, 1246 (M. D. Fla. 1971).

The second question as to whether Congress has preempted the field relative to oil pollution must, we think, be answered in the negative. Water Quality Improvement Act, 33 U.S.C. § 1161. This Court has stated that the only controversial question is "whether Congress intended to make its jurisdiction exclusive." *Head v. New Mexico Board*, 374 U. S. 424, 430 (1963), citing *California v. Zook*, 336 U. S. 725, 731 (1949), and *Kelly v. Washington*, 302 U. S. 1, 10-13 (1937).

This *Amici* believes that it is clear that Congress did not intend to preempt the field relative to oil pollution and cites for authority the Water Quality Improvement Act, 33 U.S.C. §1161 (o) (2):

"Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil into any waters within such state."

Looking at the legislative history of that Act, such intent was clearly

set out in the Conference Committee Report:

(2) of subsection (o) disclaims any intention of preempting any State or political subdivision from imposing any requirement or liability with respect to the discharge of oil into waters in that State. Thus, *any State would be free to provide requirements and penalties similar to those imposed by this section or additional requirements and penalties.* These, however, would be separate and independent from those imposed by this section and would be enforced by the States through its courts." Conf. Rep. No. 91-940, 1970 U. S. Cong. and Admin. News, p. 2727. (Emphasis supplied.)

The State of North Carolina argues that the Congressional intent not to preempt a field could not have been more clearly manifested. This Court said in *Reid v. Colorado*, 187 U. S. 137, 148 (1902):

"It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested." (Reiterated in *Kelly v. Washington*, *supra*, p. 11)

When Congress passes legislation in a particular field, it is not necessary for them to occupy the whole field. They can determine how far its regulations shall go and only occupy a limited area of that field. *Kelly v. Washington*, *id* , p. 9.

Finally, North Carolina would argue to the Court that the primary responsibility over water pollution is with the individual states. This the Congress itself has clearly stated in the declaration of policy by Congress in the Water Pollution Control Act Amendments of 1956, 33 U.S.C. § 1151 (b):

"In connection with the exercise of jurisdiction over the waterways of the Nation and in consequence of the benefits resulting to the public health and welfare by the prevention and control of water

BLEED THROUGH POOR COPY

pollution, it is declared to be the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States in preventing and controlling water pollution. . . ."

A similar intent of Congress to recognize the primary responsibility of States and local government is evident in the Air Quality Act of 1967 (42 U.S.C. 1857), and this Court recognized the importance of such local concern in *Huron Portland Cement v. Detroit*, *supra*. Certainly the concern over water pollution by the state and local community is as great as that over air pollution.

As this Court said in *Kelly v. Washington*, *supra*, pp. 9, 10:

"Under our constitutional system, there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. *Minnesota Rate Cases*, 230 U. S. 352, 402.

Not only did Congress not intend to preempt the field of water pollution control merely because it affects interstate commerce, but they specifically encouraged the states to concern themselves with the abatement of pollution in *interstate* waters. See 33 U.S.C. § 1160 (b) which provides:

"Consistent with the policy declaration of this chapter, State and interstate action to abate pollution of interstate or navigable waters shall be encouraged and shall not, except as otherwise provided by or pursuant to court order under subsection (h) of this section, be displaced by Federal enforcement action."

CONCLUSION

Based on the foregoing arguments, the State of North Carolina believes that the United States District Court for the Middle District of Florida committed error which could result in the serious curtailment of the police powers of the states to protect their citizens and property from the serious consequences of pollution.

pollution. It is directed to the policy of Congress
to encourage private and public the primary
responsibilities and rights of the States in preventing
and controlling water pollution.

Under the Federal Water Pollution Control Act
of 1947 (61 Stat. 1558) and the Clean Water Act
of 1961 (77 Stat. 833), the Federal Government
has assumed a leadership role in the control of water
pollution. The Federal Government is now a leader in
the control of water pollution.

As the Federal Government is now a leader in the control of water pollution, it is now a leader in the control of water pollution.

The Federal Government is now a leader in the control of water pollution. It is now a leader in the control of water pollution. It is now a leader in the control of water pollution.

The Federal Government is now a leader in the control of water pollution. It is now a leader in the control of water pollution. It is now a leader in the control of water pollution.

The Federal Government is now a leader in the control of water pollution. It is now a leader in the control of water pollution. It is now a leader in the control of water pollution.

The Federal Government is now a leader in the control of water pollution. It is now a leader in the control of water pollution. It is now a leader in the control of water pollution.

Therefore, the State of North Carolina prays the Court to reverse the judgment of the United States District Court for the Middle District of Florida.

Respectfully submitted,

ROBERT MORGAN
Attorney General

Thomas E. Kane
Ocean Law Consultant

Christine Y. Denson
Assistant Attorney General
Post Office Box 629
Raleigh, North Carolina 27602

Telephone (919) 829-4618

BLEED THROUGH POOR COPY

PROOF OF SERVICE

I, Christine Y. Denson, hereby certify that on the _____ day of June, 1972, I served three copies of the above Amicus Curiae Brief of the State of North Carolina by first-class mail, prepaid, at the United States Post Office at Raleigh, North Carolina on all attorneys of record.

Christine Y. Denson
Assistant Attorney General

IN THE
SUPREME COURT
OF THE
UNITED STATES

October Term, 1971

No. 1082

REUBIN O'D. ASKEW, et al.,
Appellants,

v.

THE AMERICAN WATERWAYS
OPERATORS, INC., et al.,
Appellees.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE MIDDLE
DISTRICT OF FLORIDA

AMICUS CURIAE BRIEF
FOR THE STATE OF WASHINGTON

SLADE GORTON,
Attorney General,

CHARLES B. ROE, JR.,
*Senior Assistant Attorney
General,*

CHARLES W. LEAN,
Assistant Attorney General.

BLEED THROUGH POOR COPY

INDEX

	Page
STATEMENT OF INTEREST.....	5
ARGUMENT	9
I. STATE OIL POLLUTION CONTROL STATUTES SUCH AS FLORIDA'S DO NOT CONFLICT WITH FEDERAL MARITIME LAW.....	9
II. CONGRESS IS EMPOWERED TO DETERMINE WHEN STATE STATUTES MAY OPERATE IN THE AREA OF MARITIME LAW.....	16
CONCLUSION	17
APPENDIX A	19

TABLE OF CASES

American Waterways Operators, Inc. v. Askew, 335 F. Supp. 1241 (U.S.D.C. M.D. Fla. (1971)).....	10
Huron Portland Cement Company v. City of Detroit, 362 U.S. 440 (1960).....	11
Knickerbocker Ice Company v. Stewart, 253 U.S. 149 (1920)	16
Manchester v. Massachusetts, 139 U.S. 240 (1891).....	10
Morgan's Steamship Co. v. Louisiana Board of Health, et al., 118 U.S. 455 (1886).....	11
Romero v. International Terminal Operating Co., 358 U.S. 354 (1958).....	16
Skiriotes v. Florida, 313 U.S. 69 (1941).....	10
Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917).....	16
Standard Dredging Company v. Murphy, 319 U.S. 306 (1942)	16

UNITED STATES STATUTES

Federal Water Pollution Control Act	
(1970 Amendments)	
Sec. 1	13
Sec. 11(o)	14
United States Constitution	
Art. III, Sec. 2.....	12
Art. I, Sec. 8.....	12

Water Quality Improvement Act of 1970, Publ. Law No. 91-224, Sec. 102, 84 Stat. 94.....	7, 15
Conference Committee Report Accompanying Water Quality Improvement Act of 1970, House Report, H.R. 91-940 to accompany H.R. 4148, 91st Congress, 2d Session, March 24, 1970, p. 42.....	15

WASHINGTON STATE STATUTES

Chapter 216, Laws of 1945.....	6
Chapter 133, Laws of 1969, First Extraordinary Session..	7
Chapter 88, Laws of 1970, First Extraordinary Session...	7
Chapter 180, Laws of 1971, First Extraordinary Session..	8
Revised Code of Washington	
90.48 (Water Pollution Control Act).....	6
90.48.010	10
90.48.020	9
90.48.320	7, 8
90.48.336	7
90.54 (Water Resources Act of 1971).....	8
90.54.020	8
90.58 (Shoreline Management Act of 1971).....	9
90.58.160	9

OTHER STATE STATUTES

Florida's Oil Spill Prevention and Pollution Control Act, Ch. 376, Florida Statutes Annotated; Ch. 70-244, Laws of 1971	10
---	----

CONGRESSIONAL PROPOSALS

S. 2770	15
H. R. 11896.....	15

OTHER AUTHORITY

Gilmore and Black, The Laws of Admiralty 28 (1957)...	9
---	---

IN THE
SUPREME COURT
OF THE
UNITED STATES

October Term, 1971
No. 1082

REUBIN O'D. ASKEW, et al.,
Appellants,
v.
THE AMERICAN WATERWAYS
OPERATORS, INC., et al.,
Appellees.

**AMICUS CURIAE BRIEF
FOR THE STATE OF WASHINGTON**

The State of Washington, by and through its Attorney General, files this Amicus Curiae brief under Rule 42(4) of this Court.

STATEMENT OF INTEREST

All who are acquainted with the State of Washington know that its lifeblood is closely associated with two water bodies (1) the mighty Columbia River—which enters the Northeast corner of the state from British Columbia and snakes through the eastern half of the state until it turns west as the border between Oregon and Washington and dis-

charges at Washington's Southwest corner into the Pacific Ocean; and (2) Puget Sound—a large arm of the Pacific Ocean which flows on tidal cyclic basis deep into western Washington.

The total livability of the state is dependent primarily on the quantity and quality of these waters and their tributaries. Not only are they valuable for navigation, both commercial and recreational, but fish and wildlife use them for homes, food sources and resting areas. They are also of the greatest import for their scenic and aesthetic values. And, in the case of the Columbia, hydroelectric power production and agricultural irrigation uses are most important. It is fair to conclude that the environment of Washington State, including the essential character of its citizens, is determined largely by the condition of the Columbia River and Puget Sound and their associated waters.

Recognizing their importance, the government of Washington State has taken a number of very significant steps to protect these priceless resources. This has been especially true with regard to their quality.

Twenty-seven years ago the Washington State Legislature enacted the state's basic water pollution control act. Chapter 216, Laws of 1945, now codified in Chapter 90.48 RCW. Of utmost importance in 1969 and 1970 the state legislature, having in mind the disastrous Torrey Canyon and Santa Barbara

incidents and the possibility that large quantities of oil might be entering Puget Sound from Alaska's North Slope oil fields, amended the basic act by including new provisions dealing specifically with pollution of water *by oil*. See Chapter 133, Laws of 1969, First Extraordinary Session; and Chapter 88, Laws of 1970, First Extraordinary Session. These amendatory sections, which it is noted were enacted prior to the passage of the federal oil pollution control legislation contained in the Water Quality Improvement Act of 1970; Publ. L. No. 91-224, Sec. 102, 84 Stat. 94, set forth approaches to oil pollution control which were in some substantial respects similar to the Florida Act being reviewed in this case.

The tone of Washington's Act is set forth in RCW 90.48.320 and RCW 90.48.336 which provide in pertinent part:

It shall be unlawful, except under the circumstances hereafter described in this section, for oil to enter the waters of the state from any ship or any fixed or mobile facility or installation located offshore or onshore whether publicly or privately operated, regardless of the cause of the entry or fault of the person having control over the oil, or regardless of whether it be the result of intentional or negligent conduct, accident or other cause. * * * (RCW 90.48.320)

Any person owning oil or having control over the same which enters the waters of the state in violation of RCW 90.48.320 shall be strictly liable, without regard to fault, for the damages to persons or property, public or private, caused by such entry. * * * (RCW 90.48.336)

Other sections of the Act provide for liabilities for "clean-up" costs, a permit system, civil penalties—up to \$20,000 per violation, reporting requirements and a "right of entry." See RCW 90.48.320 et seq. (The state's oil pollution control laws are set forth in total in Appendix A hereof.)

Oil pollution continued on the minds of the state's legislators in 1971 and, as a result, the state's oil pollution control laws were further amended to include such features as the establishment of a "coastal protection fund" to finance oil pollution control activities, and the authority to establish rules and regulations pertaining to "the times, places and methods of transfer of oil" within the state, Chapter 180, Laws of 1971, First Extraordinary Session.

In addition, during the same session the legislature reaffirmed, through the Water Resources Act of 1971—Chapter 90.54 RCW, a policy of high quality for public waters. Pertinent language of RCW 90.54.020 provides as a "fundamental" of state water policy that:

* * *

(3) The quality of the natural environment shall be protected and, where possible, enhanced as follows:

(a) Perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values. Lakes and ponds shall be retained substantially in their natural condition. Withdrawals of water which would conflict

therewith shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served.

(b) *Water of the state shall be of high quality.* Regardless of the quality of the waters of the state, all wastes and other materials and substances proposed for entry into said waters shall be provided with all known, available, and reasonable methods of treatment prior to entry. Notwithstanding that standards of quality established for the waters of the state would not be violated, wastes and other materials and substances shall not be allowed to enter such waters which will reduce the existing quality thereof, except in those situations where it is clear that overriding considerations of the public interest will be served.¹ (Emphasis supplied.)

The dominant waters of the State of Washington, such as Puget Sound and the Columbia River and many of their tributaries, are navigable waters in terms of admiralty jurisdiction. *Gilmore and Black, The Law of Admiralty* 28 (1957). Likewise, the state statutes just mentioned apply to these same waters. RCW 90.48.020.

ARGUMENT

I. State Oil Pollution Control Statutes Such As Florida's Do Not Conflict With Federal Maritime Law.

This brief is submitted because of a threat to

¹The legislature's interest in warding off oil pollution threats also caused the inclusion of the following language in the state's "Shoreline Management Act of 1971"—Chapter 90.58 RCW. RCW 90.58.160 provides:

"Surface drilling for oil or gas is prohibited in the waters of Puget Sound north to the Canadian boundary and the Strait of Juan de Fuca seaward from the ordinary high water mark and on all lands within one thousand feet landward from said mark."

the ability of the state to protect its natural resources and to insure, as best the state can, that its environmental future is bright. The lower court in this case has held that Florida's oil pollution control laws are in conflict with federal maritime law. *American Waterways Operators, Inc. v. Askew*, 335 F. Supp. 1241 (U.S.D.C. M.D. Fla. 1971).⁷ If such reasoning is upheld, not only will Washington's oil pollution control laws, as just described, come under a large unconstitutional cloud, but its general water pollution control laws as applied to maritime matters as well.

We urge the rejection of any analysis which leads to such a result. This Court long ago recognized the authority of a state to enact legislation dealing with maritime waters to protect its fishery resources. *Manchester v. Massachusetts*, 139 U.S. 240 (1891). See also, *Skiriotes v. Florida*, 313 U.S. 69 (1941). The water and oil pollution control laws of Washington are designed, in considerable part, to protect these same resources.⁸ In a similar vein, a Louisiana statute dealing with quarantive regulations pertaining to protection of public health (cholera control) which touched upon admiralty jurisdic-

⁷Florida's "Oil Spill Prevention and Pollution Control Act" is found in Chapter 376, Florida Statutes Annotated: Chapter 70-244, Laws of 1971.

⁸The first section of the state's Water Pollution Control Act, RCW 90.48.010, provides in part:

"It is declared to be the policy of the state of Washington to maintain the highest possible standards to insure the purity of all waters of the state consistent with public health and public enjoyment thereof, the propagation and protection of wildlife, birds, game, fish and other aquatic life, * * * ." (Emphasis supplied.)

tion, was upheld in *Morgan's Steamship Co. v. Louisiana Board of Health, et al.*, 118 U.S. 455 (1886). A further example of valid state action in the area of environmental protection is contained in a recent case of this Court upholding an ordinance of the City of Detroit relating to the control of emissions to the air from a ship docked in maritime waters. *Huren Portland Cement Company v. City of Detroit*, 362 U.S. 440, 443 (1960). In the course of its opinion, the Court described the federal-state relationship in the field of pollution control, as follows:

The ordinance was enacted for the manifest purpose of promoting the health and welfare of the city's inhabitants. Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power. In the exercise of that power, the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government. [Citations omitted.]

The basic limitations upon local legislative power in this area are clear enough. The controlling principles have been reiterated over the years in a host of this Court's decisions. Even-handed local regulation to effectuate a legitimate local public interest is valid unless preempted by federal action, [Citations omitted.] or unduly burdensome on maritime activities or interstate commerce. [Citations omitted.]

In determining whether state regulation has been preempted by federal action, "the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred

from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State." [Citations omitted.]

In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the Constitution when "conferring upon Congress the regulation of commerce, * * * never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution." [Citations omitted.] But a state may not impose a burden which materially affects interstate commerce in an area where uniformity of regulation is necessary. [Citations omitted.]

This leads us to a consideration of oil pollution regulation in light of provisions of the United States Constitution and federal statutes.

Nothing is contained in the United States Constitution which places exclusive jurisdiction over such matters in the United States. The only provision thereof referring directly to maritime matters is Article III, Sec. 2, which extends the judicial power of the "United States * * * to all cases of admiralty and maritime jurisdiction." In addition, Art. I, Sec. 8, confers upon Congress the power to "make all laws which shall be necessary and

proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof. * * *

An examination of the latest as well as the key federal statutes pertaining to oil pollution control and federal-state relations, the 1970 amendments to the Federal Water Pollution Control Act, is pertinent. A close evaluation of the Federal Water Pollution Control Act reveals that Congress did not intend to preclude state activity in the area; rather, to the contrary, state governments were encouraged to play the primary role of front-line, day to day combatant in the national fight for clean "maritime" water.

We first refer to the policy section of the Act, Section 1, which provides:

DECLARATION OF POLICY

Sec. 1. (a) The purpose of this Act is to enhance the quality and value of our water resources and to establish a national policy for the prevention, control, and abatement of water pollution.

(b) In connection with the exercise of jurisdiction over the waterways of the Nation and in consequence of the benefits resulting to the public health and welfare by the prevention and control of water pollution, it is hereby declared to be the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States in preventing and controlling water pollution, to support and aid technical research relating to the preven-

tion and control of water pollution, and to provide Federal technical services and financial aid to State and interstate agencies and to municipalities in connection with the prevention and control of water pollution. The Secretary of Health, Education, and Welfare (hereinafter in this Act called "Secretary") shall administer this Act through the Administration created by section 2 of this Act, and with the assistance of an Assistant Secretary of Health, Education, and Welfare designated by him, shall supervise and direct the head of such Administration in administering this Act. Such Assistant Secretary shall perform such additional functions as the Secretary may prescribe.

(c) Nothing in this Act shall be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States. (Emphasis supplied.)

Turning to the specific sections of the Federal Water Pollution Control Act, concerning oil pollution, Sec. 11(o), provides:

(1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency under any provision of law for damages to any publicly-owned or privately-owned property resulting from a discharge of any oil or from the removal of any such oil.

(2) Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil into any waters within such State.

(3) Nothing in this section shall be con-

strued as affecting or modifying any other existing authority of any Federal department, agency, or instrumentality, relative to onshore or offshore facilities under this Act or any other provision of law, or to affect any State or local law not in conflict with this section.* (Emphasis supplied.)

Taken together, these statutes set forth clearly a federal-state relationship within the area of oil pollution control on navigable waters which contemplates that state oil pollution statutes existing prior to the enactment of the Water Quality Improvement Act of 1970, such as Washington's, or enacted subsequent thereto, such as Florida's, should remain in effect. That Congress intended such a conclusion, we refer to the following language of the Conference Committee Report accompanying the Water Quality Improvement Act of 1970:

Paragraph (2) of subsection (o) disclaims any intention of preempting any State or political subdivision from imposing any requirement or liability with respect to the discharge of oil into waters in that State. *Thus, any State would be free to provide requirements and penalties similar to those imposed by this section or additional requirements and penalties.* These, however, would be separate and independent from those imposed by this section and would be enforced by the States through its courts. (Emphasis supplied.)

House Report, H.R. 91-940 to accompany H.R. 4148, 91st Congress, 2d Session, March 24, 1970, p. 42

*None of the amendments to the Federal Water Pollution Control Act pending presently in a conference committee considering S. 2770 and H.R. 11896 modifies the above-quoted portions of that act.

II. Congress Is Empowered To Determine When State Statutes May Operate In The Area Of Maritime Law.

In arriving at its holding the lower court placed heavy reliance on the cases of *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), and *Knickerbocker Ice Company v. Stewart*, 253 U.S. 149 (1920).

The major teaching of the *Jensen* case is that where the subject for regulation is national in character, there is a uniformity requirement in maritime law which precludes state action in two situations: 1—where state action conflicts with acts of Congress; and 2—where state action contravenes general maritime law. The case also teaches that when a subject which relates to maritime matters is local in character, then there is room for states to legislate and regulate, effectively. But see *Standard Dredging Company v. Murphy*, 319 U.S. 306 (1942). See also *Romero v. International Terminal Operating Company*, 358 U.S. 354, 373 (1958).

The next issue relates to who determines when a matter, although maritime in nature, is subject to state regulatory legislation. The *Knickerbocker* case, *supra*, may say that while the federal courts can make such determinations Congress cannot. If this is correct, the doctrine of the *Knickerbocker* case is unhealthy and should not be continued. In our view, Congress has the authority to determine when state regulation becomes unduly burdensome

to the maritime policy of harmony and uniformity. Indeed Congress is better equipped generally than the courts to investigate the effects of state regulation on maritime commerce and strike a balance with particularized state interests. This is specially true, we submit, when the local interest is in an area, such as the environmental protection, where issues relating to the attainment of high quality living conditions are involved.

If Congress has the power to develop the appropriate relationships between the federal government and the states in the area of water pollution control and maritime regulation, as we suggest it has, then that relationship has been established under the present provisions of the Federal Water Pollution Control Act. And as discussed earlier, the relationships under that Act contemplate that state statutes dealing with oil pollution control, such as Florida's and Washington's, are not only contemplated but effective under federal law.

CONCLUSION

This case raises serious issues of federalism involving policies of uniform national rules for protection of waterborne shipping interests and of interstate commerce and the aspirations of states, through the exercise of police powers, to shape their futures around natural environments of high quality. The stakes in our national effort to protect the natural environment are too great to remove the states from

a position of direct influence unless the Constitution demands clearly that result. When a state, such as Washington, enacts an arsenal of environmental protection tools in an attempt to bring about for its citizens a high quality environment, possibly higher than those attainable or provided under federal policy, that state should not be squelched in its efforts in the name of an unclear policy of uniformity developed from a blurry past.

The clear intent of the latest Congressional acts pertaining to water pollution control, including pollution from oil, is the establishment of a joint and closely coordinated effort by the Federal Government and the states which combines the best talents of both.

Under this national program, state statutes, such as those of Florida, are valid; indeed essential.

Respectfully submitted,

SLADE GORTON,

Attorney General,

CHARLES B. ROE, JR.,

Section Assistant Attorney General,

CHARLES W. LEAN,

Assistant Attorney General,
Attorneys for Amicus Curiae
State of Washington.

June, 1972

APPENDIX A

REVISED CODE OF WASHINGTON (RCW 90.48.315 et seq.) WASHINGTON'S OIL POLLUTION CONTROL LAWS

90.48.315 DISCHARGE OF OIL INTO WATERS OF THE STATE. DEFINITIONS. For purposes of RCW 90.48.315 through 90.48.365 and RCW 78.52.020, 78.52.125, 82.36.330, 90.48.315, 90.48.370 through 90.48.410, 90.48.903, 90.48.906 and 90.48.907 the following definitions shall apply unless the context indicates otherwise:

- (1) "Board" shall mean the pollution control hearings board.
- (2) "Department" shall mean the department of ecology.
- (3) "Director" shall mean the director of the department of ecology.
- (4) "Discharge" shall mean any spilling, leaking, pumping, pouring, emitting, emptying, or dumping.
- (5) "Fund" shall mean the state coastal protection fund as provided in RCW 90.48.390 and 90.48.400.
- (6) "Haying control over oil" shall include but not be limited to any person using, storing, or transporting oil immediately prior to entry of such oil

into the waters of the state, and shall specifically include carriers and bailees of such oil.

(7) "Oil" or "oils" shall mean oil, including gasoline, crude oil, fuel oil, diesel oil, lubricating oil, sludge, oil refuse, or any other petroleum related product.

(8) "Person" shall mean any political subdivision, government agency, municipality, industry, public or private corporation, copartnership, association, firm, individual, or any other entity whatsoever and any owner, operator, master, officer, or employee of a ship.

(9) "Ship" shall mean any boat, ship, vessel, barge, or other floating craft of any kind.

(10) "Waters of the state" shall include lakes, rivers, ponds, streams, inland waters, underground water, salt waters, estuaries, tidal flats, beaches and lands adjoining the seacoast of the state, sewers, and all other surface waters and watercourses within the jurisdiction of the state of Washington. [1971 1st ex.s. c 180 § 1; 1970 ex.s. c 88 § 1; 1969 ex.s. c 133 § 10.]

SEVERABILITY—1969 1st ex.s. c 133: "If any provision of this 1969 act or the application thereof to any person or circumstance is held invalid, this 1969 act can be given effect without the invalid provision or application; and to

this end the provisions of this 1969 act are declared to be severable. This 1969 act shall be liberally construed to effectuate its purpose." [1969 1st ex.s. c 133 § 12.] This applies to RCW 90.48-.315 through 90.48.363.

90.48.320 ————— UNLAWFUL FOR OIL TO ENTER WATERS—EXCEPTIONS. It shall be unlawful, except under the circumstances hereafter described

in this section, for oil to enter the waters of the state from any ship or any fixed or mobile facility or installation located offshore or onshore whether publicly or privately operated, regardless of the cause of the entry or fault of the person having control over the oil, or regardless of whether it be the result of intentional or negligent conduct, accident or other cause. This section shall not apply to discharges of oil in the following circumstances:

(1) The person discharging was expressly authorized to do so by the water pollution control commission prior to the entry of the oil into state waters;

(2) The person discharging was authorized to do so by operation of law as provided in RCW 90.48.200;

(3) Where a person having control over the oil can prove that a discharge was caused by:

(a) an act of war or sabotage, or

(b) negligence on the part of the United States government, or the state of Washington. [1970 1st ex.s. c 88 § 2; 1969 ex.s. c 133 § 1.]

90.48.325 ————OBLIGATION TO COLLECT AND REMOVE OR CONTAIN, TREAT AND DISPERSE AFTER ENTRY. DIRECTOR TO PROHIBIT HARMFUL DISPERSANTS. It shall be the obligation of any person owning or having control over oil entering waters of the state in violation of RCW 90.48.320 to immediately

collect and remove the same. If it is not feasible to collect and remove, said person shall take all practicable actions to contain, treat and disperse the same. The director shall prohibit or restrict the use of any chemicals or other dispersant or treatment materials proposed for use under this section whenever it appears to him that use thereof would be detrimental to the public interest. [1970 1st ex.s. c 88 § 3; 1969 ex.s. c 133 § 2.]

90.48.330 ————COMMISSION MAY INVESTIGATE, REMOVE, CONTAIN, TREAT OR DISPERSE OIL DISCHARGED—LIMITATION—RECORD OF EXPENSES INCURRED. The water pollution control commission is authorized, with the staff, equipment and material under its control, or by contract with others, to take such actions as are necessary to collect, investigate, perform surveillance over, remove, contain, treat, or disperse oil discharged into waters of the state. The director of the commission shall keep a record of all necessary expenses incurred in carrying out any project or activity authorized under this section, including a reasonable charge for the services performed by the state's personnel and the state's equipment and materials utilized. The authority granted hereunder shall be limited to projects and activities which are designed to protect the public interest or public property. [1970 1st ex.s. c 84 § 4; 1969 ex.s. c 133 § 3.]

90.48.335 ————LIABILITY FOR EXPENSES INCURRED BY COMMISSION. Any person who fails to

immediately collect, remove, contain, treat or disperse or when under an obligation to do so as provided in RCW 90.48.335, shall be responsible for the necessary expenses incurred by the state in carrying out a project or activity authorized under RCW 90.48.330. [1970 1st ex.s. c 88 § 5; 1969 ex.s. c 133 § 4.]

90.48.336 ———STRICT LIABILITY OF OWNER OR CONTROLLER OF OIL FOR DAMAGES TO PERSONS OR PROPERTY—EXCEPTIONS. Any person owning oil or having control over the same which enters the waters of the state in violation of RCW 90.48.320 shall be strictly liable, without regard to fault, for the damages to persons or property, public or private, caused by such entry. In any action to recover such damages, said person shall be relieved from strict liability, without regard to fault, if he can prove that the oil to which the damages relate entered the waters of the state by causes set forth in RCW 90.48.320(3). [1970 1st ex.s. c 88 § 6.]

90.48.338 ———OTHER PERSONS CAUSING ENTRY OF OIL DIRECTLY LIABLE TO STATE FOR CLEANUP EXPENSES—CAUSE OF ACTION BY PERSONS LIABLE UNDER RCW 90.48.325 AND 90.48.350 AGAINST OTHERS. In addition to any cause of action the state may have to recover necessary expenses for the cleanup of oil pursuant to RCW 90.48.325 and 90.48.350, any other person causing the entry of oil shall be directly liable to the state for the necessary expenses of oil cleanup arising from such entry and the state

shall have a cause of action to recover from any or all of said persons. Any person liable for cost of oil cleanup as provided in RCW 90.48.325 and 90.48.350 shall have a cause of action to recover for costs of cleanup from any other person causing the entry of oil into the waters of the state including any amount recoverable by the state as necessary expenses under RCW 90.48.350. [1970 1st ex.s. c 88 § 7.]

90.48.340 —————COMMISSION INVESTIGATION OF CIRCUMSTANCES OF ENTRY—ORDER FOR REIMBURSEMENT OF EXPENSES INCURRED BY COMMISSION—MODIFICATION—ACTION TO RECOVER—"NECESSARY EXPENSES". The director shall investigate each activity or project conducted, under RCW 90.48.330 to determine, if possible, the circumstances surrounding the entry of oil into waters of the state and the person or persons allowing said entry or responsible for the act of acts which result in said entry. Whenever it appears to the director, after investigation, that a specific person or persons are responsible for the necessary expenses incurred by the state pertaining to a project or activity as specified in RCW 90.48.335, the director shall notify said person or persons by appropriate order: *Provided*, That no order may be issued pertaining to a project or activity which was completed more than five years prior to the date of the proposed issuance of the order. Said order shall state the findings of the director, the amount of necessary expenses incurred

by the commission in conducting the project or activity, and a notice that said amount is due and payable immediately upon receipt of said order. The commission may, upon application from the recipient of an order received within thirty days from the receipt of the order, reduce or set aside in its entirety the amount due and payable, when it appears from the application, and from any further investigation the commission may desire to undertake, that a reduction or setting aside is just and fair under all the circumstances. If the amount specified in the order issued by the director notifying said person or persons is not paid within thirty days after receipt of notice imposing the same, or if an application has been made within thirty days as herein provided and the amount provided in the order issued by the commission subsequent to such application is not paid within fifteen days after receipt thereof, the attorney general, upon request of the director, shall bring an action on behalf of the state in the superior court of Thurston county or any county in which the person to which the order is directed does business to recover the amount specified in the final order of the director or the commission, as appropriate. No order issued under this section shall be construed as an order within the meaning of RCW 90.48.135. In any action to recover necessary expenses as herein provided said person shall be relieved from liability for necessary expenses if he can prove that the oil to which the

necessary expenses relate entered the waters of the state by causes set forth in RCW 90.48.320(3). For purposes of this section "necessary expenses" shall not include expenses relating to investigation or the performance of surveillance. [1970 1st ex.s. c 88 § 10; 1969 ex.s. c 133 § 5.]

90.48.343 ————PERMIT REQUIRED PRIOR TO DISCHARGE—AUTHORITY OF DIRECTOR. Any person who proposes to discharge oil or cause or permit the entry of same into waters of the state shall prior to such discharge obtain permission from the director of the water pollution control commission. The director is authorized to permit the discharge of oil into waters of the state consistent with the pertinent effluent and receiving water standards and treatment requirements established by the commission. Permission for industrial or commercial discharges shall be given through the terms of a waste discharge permit issued pursuant to RCW 90.48.180. Permission shall be given in all other cases on a form prescribed by the director. [1970 1st ex.s. c 88 § 8.]

90.48.345 ————RULES AND REGULATIONS. The commission shall adopt such rules and regulations as it deems necessary and proper for the purpose of carrying out the provisions of RCW 90.48.315 through 90.48.365. [1969 1st ex.s. c 133 § 6.]

90.48.350 ————PENALTY FOR VIOLATION—MITIGATION—ACTION TO RECOVER—DISPOSITION OF PENALTIES RECOVERED. Any person who intention-

ally or negligently discharges oil, or causes or permits the entry of the same, shall incur, in addition to any other penalty as provided by law, a penalty in an amount of up to twenty thousand dollars for every such violation; said amount to be determined by the director of the commission after taking into consideration the gravity of the violation, the previous record of the violator in complying, or failing to comply, with the provisions of chapter 90.48 RCW, and such other considerations as the director deems appropriate. Every act of commission or omission which procures, aids or abets in the violation shall be considered a violation under the provisions of this section and subject to the penalty herein provided for. The penalty herein provided for shall become due and payable when the person incurring the same receives a notice in writing from the director of the commission describing such violation with reasonable particularity and advising such person that the penalty is due. The director may, upon written application therefor, received within fifteen days, and when deemed in the best interest of the state in carrying out the purposes of this chapter, remit or mitigate any penalty provided for in this section or discontinue any prosecution to recover the same upon such terms as he in his discretion shall deem proper, and shall have the authority to ascertain the facts upon all such applications in such manner and under such regulations as he may deem proper. If the amount of such pen-

alty is not paid to the commission within fifteen days after the receipt of notice imposing the same, or if an application for remission or mitigation has been made within fifteen days as herein provided and the amount provided in the order issued by the director subsequent to such application is not paid within fifteen days after the receipt thereof, the attorney general, upon the request of the director, shall bring an action in the name of the state of Washington in the superior court of Thurston county or any other county in which such violator may do business, to recover the amount specified in the final order of the director. In all such actions the procedure and rules of evidence shall be the same as an ordinary civil action except as otherwise in this chapter provided. All penalties recovered under this section shall be paid into the state treasury and credited to the general fund. No order issued under this section shall be construed as an order within the meaning of RCW 90.48.135. [1970 1st ex.s. c 88 § 9; 1969 ex.s. c 133 § 7.]

90.48.355 ————RIGHT OF ENTRY, ACCESS TO RECORDS, PERTINENT TO COMMISSION INVESTIGATIONS. The commission, through its duly authorized representatives, shall have the power to enter upon any private or public property, including the boarding of any ship, at any reasonable time, and the owner, managing agent, master or occupant of such property shall permit such entry for the purpose of investigating conditions relating to violations or

possible violations of RCW 90.48.315 through 90.48.365, and to have access to any pertinent records relating to such property, including but not limited to operation and maintenance records and logs: *Provided*, That in connection with the authority granted herein no person shall be required to divulge trade secrets or secret processes. [1969 1st ex.s. c 133 § 8.]

90.48.360 ————DUTY TO NOTIFY COMMISSION OFFICE OF DISCHARGE—EXCEPTION. It shall be the duty of any person discharging oil or otherwise causing, permitting, or allowing the same to enter the waters of the state, unless the discharge or entry was expressly authorized by the commission prior thereto or authorized by operation of law under RCW 90.48.200, to immediately notify the water pollution control commission at its office in Olympia, or a regional office thereof, of such discharge or entry. [1969 1st ex.s. c 133 § 9.]

90.48.365 ————COMMISSION POWERS HEREUNDER SUPPLEMENTAL—EFFECT. RCW 90.48.315 through 90.48.365 shall grant authority to the water pollution control commission which is supplemental to and in no way reduces or otherwise modifies the powers heretofore granted to the water pollution control commission, except as it may directly conflict therewith. [1969 1st ex.s. c 133 § 11.]

90.48.370 DEPARTMENTAL POWERS AND DUTIES AS EXERCISE OF STATE POLICE POWER—EXTENSION

TO ALL WATERS WITHIN STATE. The powers, duties, and functions conferred by RCW 78.52.020, 78.52.125, 82.36.330, 90.48.315, 90.48.370 through 90.48.410, 90.48.903, 90.48.906 and 90.48.907 shall be exercised by the department of ecology and shall be deemed an essential government function in the exercise of the police power of the state. Such powers, duties, and functions of the department and those conferred by RCW 90.48.315 through 90.48.365 shall extend to all waters within the boundaries of the state. [1971 1st ex.s. c 180 § 2.]

90.48.380 RULES AND REGULATIONS—SCOPE. The department may adopt rules and regulations including but not limited to the following matters:

(1) Procedures and methods of reporting discharges and other occurrences prohibited by RCW 90.48.315 through 90.48.365 and RCW 78.52.020, 78.52.125, 82.36.330, 90.48.315, 90.48.370 through 90.48.410, 90.48.903, 90.48.906 and 90.48.907;

(2) Procedures, methods, means, and equipment to be used by persons subject to regulations by RCW 90.48.315 through 90.48.365 and RCW 78.52.020, 78.52.125, 82.36.330, 90.48.315, 90.48.370 through 90.48.410, 90.48.903, 90.48.906 and 90.48.907 and such rules and regulations may prescribe the times, places and methods of transfer of oil;

(3) Coordination of procedures, methods,

means, and equipment to be used in the removal of oil pollutants;

(4) Development and implementation of criteria and plans to meet oil pollution occurrences of various kinds and degrees;

(5) The establishment from time to time of control districts comprising sections of the state coast and the establishment of rules and regulations to meet the particular requirements of each such district;

(6) Such other rules and regulations as the exigencies of any condition may require or such as may be reasonably necessary to carry out the intent of RCW 90.48.315 through 90.48.365 and RCW 78.52.020, 78.52.125, 82.36.330, 90.48.315, 90.48.370 through 90.48.410, 90.48.903, 90.48.906 and 90.48.907. [1971 1st ex.s. c 180 § 3.]

90.48.390 COASTAL PROTECTION FUND—MONEYS CREDITED TO—USE. The coastal protection fund is established to be used by the department as a revolving fund for carrying out the purposes of RCW 90.48.315 through 90.48.365 and RCW 78.52.020, 78.52.125, 82.36.330, 90.48.315, 90.48.370 through 90.48.410, 90.48.903, 90.48.906 and 90.48.907. To this fund there shall be credited penalties, fees, and charges received pursuant to the provisions of RCW 90.48.315 through 90.48.365 and an amount equivalent to one cent per gallon from each marine use refund claim under RCW 82.36.330.

Moneys in the fund not needed currently to meet the obligations of the department in the exercise of its powers, duties, and functions under RCW 90.48.315 through 90.48.365 and RCW 78.52.020, 78.52.125, 82.36.330, 90.48.315, 90.48.370 through 90.48.410, 90.48.903, 90.48.906 and 90.48.907 shall be deposited with the state treasurer to the credit of the fund and may be invested in such manner as is provided for by law. Interest received on such investment shall be credited to the fund. [1971 1st ex.s. c 180 § 4.]

90.48.400 ———DISBURSAL OF MONEYS FROM. (1) Moneys in the coastal protection fund shall be disbursed for the following purposes and no others:

(a) All costs of the department related to the enforcement of RCW 90.48.315 through 90.48.365 and RCW 78.52.020, 78.52.125, 82.36.330, 90.48.315, 90.48.370 through 90.48.410, 90.48.903, 90.48.906 and 90.48.907 including but not limited to equipment rental and contracting costs.

(b) All costs involved in the abatement of pollution related to the discharge of oil.

(c) The director may allocate a portion of the fund to be devoted to research and development in the causes, effects, and removal of pollution caused by the discharge of oil.

(2) Moneys disbursed from the coastal protection fund for the abatement of pollution caused

by the discharge of oil shall be reimbursed to the fund whenever:

(a) Moneys are available under any federal program; or

(b) Moneys are available from a recovery made by the department from the person liable for the discharge of oil. [1971 1st ex.s. c 180 § 5.]

BLEED THROUGH POOR COPY

SUBJECT INDEX

	Page
Jurisdictional Statement	1
Preliminary Statement	1
Contentions of Amicus State of California	3
Argument	4
The District Court's Holding That the Florida Act Unlawfully Intrudes Into Exclusive Fed- eral Admiralty Domain Is in Error	4
A. The Florida Statute Does Not Unlaw- fully Intrude Upon Maritime Jurisdiction..	4
B. The Federal Maritime Power Does Not Entirely Preclude State Legislation in Areas of Maritime Activities	5
C. Mere Differences Between State and Fed- eral Legislation on the Same Subject Mat- ter Do Not Require Invalidation of the Former	9
D. Congress Did Not Preempt the Field of Water Pollution Control by Enacting the Water Quality Improvement Act	12
Conclusion	15

TABLE OF AUTHORITIES CITED

Cases	Page
American Waterways Operators, Inc. v. Askew, 335 F.Supp. 1241 (M.D. Fla. 1971)	4
Druker v. Sullivan, 322 F.Supp. 1126 (D. Mass. 1971)	14
Fitzgerald v. A. L. Burbank & Co., 451 F.2d 670 (2d Cir. 1971)	8
Helvering v. Griffiths, 318 U.S. 371 (1943)	6
Holland v. Harrison Bros. Dry Dock and Repair Yard, Inc., 306 F.2d 369, mod. 308 F.2d 570 (5th Cir. 1962)	6
Huron Cement Co. v. Detroit, 362 U.S. 440 (1960)	7, 11, 13
Jarka Corporation v. Hellenic Lines, 182 F.2d 916 (2d Cir. 1950)	6
Just v. Chambers, 312 U.S. 383 (1941)	8, 10
Moragne v. States Marine Lines, 398 U.S. 375 (1970)	7
Morgan's Steamship Company v. Louisiana Board of Health, 118 U.S. 455 (1866)	5
Northern States Power Company v. State of Minnesota, 447 F.2d 1143 (8th Cir. 1971)	12
Petition of United States Steel Corporation, 436 F. 2d 1256 (6th Cir. 1970), cert. denied sub. nom. Cook, Administratrix v. United States Steel Corp., 402 U.S. 987 (1971)	8
Skiriotes v. Florida, 313 U.S. 69 (1941)	7, 15
Sorensen v. City of New York, 202 F.2d 857 (2d Cir. 1953), cert. denied 347 U.S. 951 (1954) ..	6
Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917)	5, 6, 7

	Page
Standard Dredging Co. v. Murphy, 319 U.S. 306 (1943)	6
State Department of Fish and Game v. S.S. Bourne- mouth, 307 F.Supp. 922 (C.D. Cal. 1969)	10
Western Boat Bldg. Co. v. O'Leary, 198 F.2d 409 (9th Cir. 1952)	6

Rules

Rules of Supreme Court of the United States, Rule 42(4)	1
--	---

Statutes

Fish and Game Code, Sec. 5650	2
Fish and Game Code, Sec. 5651	2
Florida Act, Chap. 70-244	2
Florida Act, Chap. 70-244, Sec. 11(6(c))	10
Florida Statutes Annotated, Chap. 376	2
Harbors and Navigations Code, Sec. 133	2
Harbors and Navigations Code, Sec. 151	2
United States Code, Title 28, Sec. 1253	1
United States Code, Title 33, Sec. 1161	9
United States Code, Title 33, Sec. 1161(f)	10
United States Code, Title 33, Sec. 1161(o)	13, 14
United States Code, Title 43, Sec. 1311	14
United States Code, Title 43, Sec. 1311(a)	14
United States Code, Title 43, Sec. 1333	15
United States Constitution, Art. III, Sec. 2	2, 4, 11
Water Code, Sec. 13243	2
Water Code, Sec. 13263	2
Water Code, Sec. 13304	2
Water Code, Sec. 13350	2

BLEED THROUGH POOR COPY

IN THE
Supreme Court of the United States

October Term, 1971
No. 71-1082

REUBIN O'D ASKEW, *et al.*,

Appellants,

vs.

THE AMERICAN WATERWAYS OPERATORS, INC., *et al.*,

Appellees.

Brief of the Attorney General of the State of California as Amicus Curiae in Support of Appellants Askew, State of Florida, et al

Jurisdictional Statement

This Honorable Court has noted probable jurisdiction in this appeal by the State of Florida, in the name of the State, its Governor and other state officials and agencies, from a judgment of the United States District Court for the Middle District of Florida. 28 U.S.C. § 1253. This brief, *amicus curiae*, is respectfully submitted by the State of California, by and through its Attorney General, pursuant to Rule 42(4) of this Honorable Supreme Court of the United States.

Preliminary Statement

The State of California has a vital interest in all questions having to do with water and water quality. Not only is California the largest State of the Union in terms of population, its western boundary includes

more than one-half of the Pacific Ocean coastline of the continental United States. Further, at San Diego Bay, Los Angeles-Long Beach and San Francisco Bay, it boasts the nation's three most important international harbors on the Pacific Coast. California's resources in beaches, sea life and coastal waters are known world-wide.

The California legislature has enacted provisions of law which allow state agencies such as the California Department of Fish and Game, the State Water Resources Control Board, the nine Regional Water Quality Control Boards, and the Attorney General of California to assert the interests of the state and its people when incidents of water pollution occur.¹

Thus, California has an essential interest in having the constitutional power to act in areas concerning pollution of the waters of its shores. Any holding of this Court which denies or limits that power would critically injure the State's ability to safeguard the public health, safety and welfare by regulating threats of marine pollution.

In this case, the District Court declared Chapter 70-244 of the Laws of Florida (as amended, ch. 376, Fla. Stats. Ann.) [hereinafter referred to as the "Florida Act."] unconstitutional for violation of Article III, section 2 of the federal Constitution. California submits this brief *amicus curiae* on behalf of appellants, and respectfully prays that the judgment of the District Court be reversed. In so doing we support the positions set forth in the brief submitted herein by

¹See Harbors and Navigations Code sections 133 and 151, Fish and Game Code sections 5650 and 5651, and Water Code sections 13304, 13243, 13263 and 13350.

the Honorable Attorney General of the State of New York on behalf of that State. In addition we respectfully present the following argument.

Contentions of Amicus State of California

The District Court's holding that the Florida Act unlawfully intrudes into exclusive federal admiralty domain is in error. The states do have the authority to enact legislation in order to prevent and ameliorate pollution of the waters within their jurisdictions.

- A. The Florida Act does not unlawfully intrude upon maritime jurisdiction.
- B. The federal maritime power does not entirely preclude state legislation in areas of maritime activities.
- C. Mere differences between state and federal legislation on the same subject matter do not result in invalidation of the former.
- D. Congress did not preempt the field of water pollution control by enacting the Water Quality Improvement Act.

ARGUMENT

The District Court's Holding That the Florida Act Unlawfully Intrudes Into Exclusive Federal Admiralty Domain Is in Error

The District Court held herein that the Florida statute unlawfully intruded into "the exclusive federal admiralty domain." [Opinion, p. 1246²]. The Court held that the Florida statute was invalid because a state may not legislate within the admiralty jurisdiction. [Opinion p. 1248.] The Court also stated that the Florida statute was invalid because it attempted to "change substantive maritime law" [Opinion, p. 1246], and was "in contravention with general admiralty rules or congressional enactments in the maritime field." [Opinion, p. 1248].

As will be shown below, each of the District Court's propositions is wrong. Further, they are inconsistent.

A. The Florida Statute Does Not Unlawfully Intrude Upon Maritime Jurisdiction

The District Court decided without comment that the Florida Act was of a subject matter within the realm of maritime jurisdiction. Although Article III, section 2, of the Constitution merely states that the judicial power of the United States extends "to all cases of admiralty and maritime jurisdiction," the Court states without citation that maritime law "governs virtually every facet of the shipping industry." [Opinion, p. 1245].

The Florida Act, however, is not a law governing the shipping industry, and does not seek to regulate in-

²The District Court opinion herein is reported as *American Waterways Operators, Inc. v. Askew*, 335 F.Supp. 1241 (M.D.Fla. 1971). Citations thereto in this brief shall be as follows: "Opinion p."

ternational or interstate sea traffic, although it does of necessity impose certain requirements upon vessels. The Florida Act is a valid exercise of the state's police power, in that it serves to advance the public health, welfare and safety. That the Florida Act does so is apparent on its face—it combats pollution of waters caused by oil. There can be no doubt that oil pollution endangers the public health, welfare and safety. Further, there can be no doubt that a state may exercise its police power to eradicate such dangers to its beaches, shoreline and coastal waters. This Court has upheld state police power statutes which had incidental effects upon maritime activities. See e.g., *Morgan's Steamship Company v. Louisiana Board of Health*, 118 U.S. 455 (1866) [Upholding state requirement that all vessels approaching New Orleans be inspected for yellow fever and cholera, and that such vessels pay an inspection fee.]

B. The Federal Maritime Power Does Not Entirely Preclude State Legislation in Areas of Maritime Activities

As noted, the District Court held that the Florida Act unlawfully intruded into "the exclusive federal admiralty domain." [Opinion, p. 1246]. The Court's holding therefore rests upon the conclusions that states are entirely precluded from acting in maritime areas. Assuming *arguendo* that the Florida Act is within admiralty subject matter, we shall demonstrate below that the District Court's holding does not correctly state the law.

In holding that the states may not legislate within the admiralty jurisdiction, the District Court relied primarily upon what it terms a "landmark" case, *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917),

in which this Court held that recovery was not available under a state's workman's compensation act for injuries incurred within the realm of the maritime jurisdiction. [Opinion, p. 1248]. *Jensen*, however, is anything but a landmark. It has been severely restricted as a viable precedent. Thus, in *Helvering v. Griffiths*, 318 U.S. 371, 399-400 (1943), this court termed the decision in *Jensen* "a much criticized and somewhat impaired, but not overruled, decision." In *Standard Dredging Co. v. Murphy*, 319 U.S. 306, 309 (1943), this Court stated that the *Jensen* decision "has no vitality beyond that which may continue as to state workman's compensation laws." See also, *Jarka Corportion v. Hellenic Lines*, 182 F.2d 916, 919 (2d Cir. 1950). Criticism from the Courts of Appeal has been abundant over the years. See e.g., *Holland v. Harrison Bros. Dry Dock and Repair Yard, Inc.*, 306 F.2d 369, 371 modified on other grounds, 308 F.2d 570 (5th Cir. 1962); *Sorensen v. City of New York*, 202 F.2d 857, 859-60 & n. 11 (2d Cir. 1953); cert. denied 347 U.S. 951 (1954); *Western Boat Bldg. Co. v. O'Leary*, 198 F.2d 409, 413-14 (9th Cir. 1952).

Thus, it cannot be said that the *Jensen* case is the significant authority the District Court believed it to be. In fact it appears that the law is quite contrary to the District Court's opinion:

" . . . In the exercise of [the police power], the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government. [Citations.]"

Huron Cement Co. v. Detroit, 362 U.S. 440, 442 (1960). That this is the law was even recognized by the Court in the *Jensen* opinion:

“ . . . [I]t would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. *That this may be done to some extent cannot be denied.*” (Emphasis added.) *Southern Pacific Co. v. Jensen*, *supra*, 244 U.S. 205, 216 (1917).

This Court has upheld state and local police power statutes and ordinances which arguably were maritime in nature. See, e.g., *Huron Cement Co. v. Detroit*, *supra*, 362 U.S. 440 (1960) [Upholding ordinance regulating vessel smoke discharges]; *Skiriotes v. Florida*, 313 U.S. 69 (1941) [Upholding state regulation of off-shore fisheries even though such state regulation might be enforced in navigable waters within admiralty jurisdiction].

Therefore, the District Court herein clearly was in error in boldly stating that the states may not act in areas of admiralty and maritime activities.

The District Court also rejected the contention that state law may fill “gaps” in maritime law by citing *Moragne v. States Marine Lines*, 398 U.S. 375 (1970) as “clearly put[ting] such a theory to rest.” [Opinion, p. 1249]. That decision does no such thing. In *Moragne*, this Court removed a festering thorn from the corpus of admiralty law which for decades had denied recovery from wrongful death by a next of kin

of a decedent killed as a result of a maritime tort. By now allowing such a cause of action in admiralty, this Court merely eliminated the necessity for the exception which had developed whereby next of kin were able to recover under state law if the injury occurred within a state where a cause of action for wrongful death was available. *Petition of United States Steel Corporation*, 436 F.2d 1256, 1278 (6th Cir. 1970), *cert. denied sub. nom. Cook, Administratrix v. United States Steel Corp.*, 402 U.S. 987 (1971).

"The decision in *Moragne* was primarily concerned with the lack of an admiralty remedy for wrongful death within American territorial waters. . . . Before *Moragne*, however, anyone killed within a marine league of the United States was forced to rely on the state law for any unseaworthiness claim which he might have." (Emphasis added.) *Fitzgerald v. A. L. Burbank & Co.*, 451 F.2d 670, 683 (2d Cir. 1971).

Therefore, this Court's decision in the *Moragne* case has been employed inappositely by the District Court herein. The applicable law as to the availability of state remedies in admiralty continues to be what this Court stated in *Just v. Chambers*, 312 U.S. 383, 388 (1941):

"[T]he State may modify or supplement the maritime law by creating liability which a court of admiralty will recognize and enforce when the state action is not hostile to the characteristic features of the maritime law or inconsistent with federal legislation."

C. Mere Differences Between State and Federal Legislation on the Same Subject Matter Do Not Require Invalidation of the Former

The District Court was greatly influenced in its decision by its belief that several provisions of the Florida Act differed in content from the provisions of the federal Water Quality Improvement Act, 33 U.S.C. § 1161 *et seq.*, [Opinion, pp. 1245-47] and would impermissibly attempt to "change substantive maritime law." [Opinion, p. 1246]. The Court held the Florida Act invalid because it was "in contravention with general admiralty rules or congressional enactments in the maritime field." [Opinion, p. 1248].

Initially, it should be noted that the District Court's opinion is not only wrong, but is inconsistent as well. If the Court believed that the states cannot act at all within maritime areas, then it would be compelled to void *all* state enactments, regardless of whether they might "contravene" federal maritime law. Here, however, after stating that the states may not act, the District Court goes on to note the alleged "contraventions" of federal law by the Florida Act.

Leaving the above noted inconsistency aside, it is obvious in any case that the Court's proposition is wrong as well.

Although there are differing provisions in the Florida Act and Water Quality Improvement Act (W.Q.I.A.), the Florida Act neither "changes" nor is it "in contravention" of federal maritime law. Rather, the Florida Act is consistent with and permissibly supplemental to the W.Q.I.A. The District Court noted that the federal act excuses liability for oil spills caused by acts of God, acts of war or fault of third parties. However, the Flor-

ida Act also excuses liability in the same manner as does the W.Q.I.A. The Florida Act explicitly permits the person determined to be liable to obtain reimbursement if the state finds the occurrence was the result of any of these events. Ch. 70-244, § 11(6)(c), Laws of Florida. And, while the Florida Act imposes liability for cleanup costs upon the polluter without the monetary ceiling created by the Federal statute, there is nothing in the W.Q.I.A. or elsewhere in federal law which prohibits the states from going further than the limited liability set forth in the federal act. 33 U.S.C. § 1161(f). The same is true as to remedies for damages caused by discharges other than cleanup costs. There is nothing in the Constitution or any federal law which would deprive the states of authority to provide for liability for damages occasioned by an oil spill without the necessity of proving negligence, so long as such liability is only for damages incurred within the jurisdiction of the state. *See, e.g., State Department of Fish and Game v. S.S. Bournemouth*, 307 F. Supp. 922 (C.D. Cal. 1969).

Thus, the Florida Act neither changes nor contravenes federal law. Rather, the Florida Act permissibly supplements and may properly exist side by side with the W.Q.I.A. As we have indicated previously, this court has made it clear that the states are authorized to enact such legislation.

"[T]he State may modify or supplement the maritime law by creating liability which a court of admiralty will recognize and enforce when the state action is not hostile to the characteristic features of the maritime law or inconsistent with federal legislation." *Just v. Chambers*, 312 U.S. 383, 388 (1941).

In addition, it is not the law that mere differences between federal and state statutes require the state statutes to fall. As this court recently stated:

"In the exercise of [the police power], the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government. [Citations.]

"....

"Evenhanded local regulation to effectuate a legitimate local public interest is valid unless preempted by federal action [citations]....

"In determining whether state regulation has been preempted by federal action, 'the intent to supersede the exercise by the state of its police power as to matters not covered by the federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State.' [Citations.]" *Huron Cement Co. v. Detroit*, 362 U.S. 440, 442, 443 (1960).

As demonstrated earlier in this brief, Florida was not precluded by Article III, Section 2, of the Constitution, from enacting the challenged Act. The mere fact that the federal and state provisions on the same or similar subject might be different does not require invalidation of the state law unless the federal provisions serve to preempt the field and for that reason alone preclude all state legislation in that area. Although the District Court did not discuss preemption, we shall demonstrate below that the W.Q.I.A. does not work a preemption of the state's power to legislate.

D. Congress Did Not Preempt the Field of Water Pollution Control by Enacting the Water Quality Improvement Act

In a recent opinion, the Court of Appeals articulated three tests for preemption.

1. Is compliance with both State and Federal law impossible? "A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility." [Citing *Florida Avocado & Lime Growers Assn. v. Paul*, 373 U.S. 132, 142-43 (1963)];"

2. Did Congress expressly declare preemption? Did Congress manifest an intent to displace coincident state regulation in a given area? If Congress has unequivocally and expressly declared that the authority conferred by it shall be exclusive, then there is no doubt that states cannot exert concomitant or supplemental regulatory authority over the identical activity;

3. Is there implied preemption? This may be determined from the aim and intent of Congress, the pervasiveness of the federal scheme, the nature of the subject matter—and whether exclusive federal regulation is demanded in order to achieve vital uniformity; whether state law is an obstacle to accomplishment of Congress' purposes and objectives. *Northern States Power Company v. State of Minnesota*, 447 F.2d 1143, 1146 (8th Cir. 1971).

Applying the above tests to this case, first, we note there has been no contention that compliance with both the W.Q.I.A. and the Florida law is impossible. The mere fact that some provisions of state law might be different from federal provisions does not of itself void the state provisions unless compliance with one necessarily requires a violation of the other.

Second, Congress did not expressly declare preemption either by manifesto or intent. In fact, Congress expressly permitted and impliedly invited the states to impose additional requirements or liabilities. 33 U.S.C. § 1161(o).³ It may be noted at this point the District Court's statement that Congress cannot "confer on the states" authority to legislate in matters maritime [Opinion, p. 1249] is both wrong and off target. The power of the states to so legislate regardless of Congress has been affirmed by this court more recently than the authority cited by the District Court. *Huron Cement Co. v. Detroit*, *supra*, 362 U.S. 440, 442 (1960). In addition, since Congress has the power to change the common law of admiralty, it has the power to enlarge the areas for legislation available to the states. As the District Court stated, the corpus of maritime law includes common law and congressional enactments. The court notes that Congress may effect changes in maritime law. [Opinion, pp. 1245, 1248]. Thus, Congress *may* by special enactment specifically allow the states to enact their own laws in an area which might be regarded as maritime. This was done by Congress in the W.Q.I.A. 33 U.S.C. § 1161(o).

³That section provides:

"(o) (1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency under any provision of law for damages to any publicly-owned or privately-owned property resulting from a discharge of any oil or from the removal of any such oil.

"(2) Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil into any waters within such State.

"(3) Nothing in this section shall be construed as affecting or modifying any other existing authority of any Federal de-

(This footnote is continued on next page)

Third, there has not been implied preemption. Notwithstanding the holding of the District Court, exclusive federal regulation is not demanded by the nature of the subject matter or the Congressional purpose. As stated, the declared aim and intent of Congress was to not preempt. See 33 U.S.C. § 1161(o). This same subdivision also demonstrates that Congress did not contemplate state law to be an obstacle to the purposes of the W.Q.I.A. Contrary to the holding of the District Court, it is clear that the W.Q.I.A. does not preempt the area and that there is room for state regulations when such regulations can be enforced without impairing the enforcement of the federal enactment. *Druker v. Sullivan*, 322 F.Supp. 1126, 1129 (D.Mass. 1971).

Moreover, there are other considerations which compel the conclusion that the W.Q.I.A. does not work a congressional preemption precluding state legislation. Such preemption would completely negate the right of the states to enact statutes to protect their territorial waters and the natural resources therein from irreparable damage caused by the discharge of oil into such waters. The federal Submerged Lands Act of 1953, 43 U.S.C. § 1311, et seq., granted the states title and exclusive jurisdiction in the submerged lands from the shoreline to the three-mile limit. The states are expressly granted not only the right and power to manage, administer, lease, develop, but also the use and natural resources of such submerged lands. 43 U.S.C. § 1311(a). By necessary implication, such right and

partment, agency, or instrumentality, relative to onshore or offshore facilities under this chapter or any other provision of law, or to affect any State or local law not in conflict with this section."

power must include the right, if not a duty, to *protect* such lands from pollution. That Congress recognized this right and duty is evidenced by that provision of the Submerged Lands Act which provides that the states and the federal government have concurrent jurisdiction to enforce their respective civil and criminal law over such submerged lands. 43 U.S.C. § 1333. In addition, the courts have long recognized the rights of states to legislate in protection of the fisheries upon which the coastal states so heavily depend, even though such state regulation might be enforced in navigable waters within admiralty jurisdiction. *See, e.g., Skiriotes v. Florida*, 313 U.S. 69, 74, 79 (1941).

Conclusion

For the foregoing reasons, it is respectfully requested that the judgment of the District Court be reversed and that this Court reaffirm the right of a state to enact legislation to combat water pollution to protect its coastal resources and for the health and welfare of its people.

EVELLE J. YOUNGER,
Attorney General,

JAY L. SHAVELSON,
Assistant Attorney General,

CARL BORONKAY,
JEFFREY C. FREEDMAN,
Deputy Attorneys General,
Amicus Curiae.

FILE COPY

FILED

JUN 15 1972

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

No. 71-1082

REUBIN O'D ASKEW, et al.,

Appellants,

against

THE AMERICAN WATERWAYS OPERATORS, INC., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
OF THE MIDDLE DISTRICT OF FLORIDA

BRIEF OF THE STATE OF NEW YORK, JOINED BY THE
STATES OF CONNECTICUT AND DELAWARE, AS
AMICI CURIAE IN SUPPORT OF REVERSAL

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for State of New York,
Amicus Curiae
80 Centre Street
New York, New York 10013
(212) 488-7567

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

PHILIP WEINBERG

JAMES P. CORCORAN

Assistant Attorneys General
of Counsel

BLEED THROUGH POOR COPY

TABLE OF CONTENTS

	PAGE
Interest of the <i>Amicus</i>	1
 ARGUMENT—Chapter 70-244 of the Laws of Florida, 1970, is a valid exercise of the State's police power to protect its natural resources and the health and livelihood of its citizens. It does not unconstitutionally interfere with Federal admiralty or maritime jurisdiction, nor does it operate in a field preempted by Congress	
3	3
The nature of the Florida statute	3
The statute is a valid exercise of the police power	5
The alleged interference with Federal maritime jurisdiction	9
The Water Quality Improvement Act does not preempt this field or divest the state of jurisdiction to protect its beaches and harbors ..	12
Conclusion	19

TABLE OF CASES

A. E. Nettleton Co. v. Diamond, 264 N.E. 2d 118, 27 N.Y. 2d 182 (1970), app. dism. <i>sub nom.</i> Reptile Products Ass'n v. Diamond, 401 U.S. 969	12, 18
Adams v. Tanner, 244 U.S. 590	17
Albina Engine & Machine Works, Inc. v. Hershey Chocolate Corp., 295 F. 2d 619 (9th Cir. 1961) ..	5, 11

American Manufacturers' Mut. Ins. Co. v. Manor Investment Co., 286 F.Supp. 1007 (S.D.N.Y. 1968)	PAGE 17
Anderson v. Pacific Coast S.S. Co., 225 U.S. 187	9
Brotherhood of L. Firemen v. Chicago, R.I. & P.R. Co., 393 U.S. 129	8
Chambers-Liberty Counties Naval Dist. v. Parker Bros. & Co., 263 F.Supp. 602 (S.D. Tex 1967) ..	17
Chrysler Corp. v. Tofany, 419 F. 2d 499 (2d Cir. 1969)	8, 13
Commonwealth v. Manchester, 25 N.E. 113, 152 Mass. 230 (1890)	4
Cooley v. Board of Wardens, 53 U.S. 299	9
Davis v. Department of Labor, 317 U.S. 249, reh. den. 317 U.S. 713	15, 16
Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 ..	3
Department of Health v. Passaic Valley Sewage Commission, 242 A. 2d 675, 100 N.J. Super. 540 (1968), aff'd 253 A. 2d 577, 105 N.J. Super. 565	11
Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc., — U.S. —, 92 S.Ct. 1349	13
Ferguson v. Skrupa, 372 U.S. 726	5, 17
Florida Lime & Avocado Growers v. Paul, 373 U.S. 132	12
Goldblatt v. Town of Hempstead, 369 U.S. 590	3
Gonzalez v. Freeman, 334 F. 2d 570, 118 U.S. App. D.C. 180 (1964)	14
Hahn v. Ross Island Sand & Gravel Co., 358 U.S. 272	16
Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440	3, 5, 6, 9

TABLE OF CONTENTS

iii

PAGE

In re Marinovich, 192 Pac. 156, 48 Cal. App. 474 (1920)	4
Kelly v. Washington, 302 U.S. 1	7, 9
Lake Carriers' Assn. v. MacMullan, 40 L.W. 4569 ...	9
Matter of Engelsher v. Jacobs, 157 N.E. 2d 626, 5 N.Y. 2d 370 (1959), cert. den. 360 U.S. 902	6
Matter of Guardian Life Ins. Co. v. Bohlinger, 124 N.E. 2d 110, 308 N.Y. 174 (1954), rearg. den. 125 N.E. 2d 867, 308 N.Y. 810	14
Maner v. Hamilton, 309 U.S. 598	8
McDonald v. Board of Election Commissioners, 394 U.S. 802	12
Mirkovich v. Milnor, 34 F.Supp. 409 (N.D. Cal. 1940)	4
Morgan's Steamship Company v. Louisiana Board of Health, 118 U.S. 455	5
New York State Waterways Assn. v. Diamond, — F.Supp. — (W.D.N.Y., Burke, J., decided Jan. 12, 1971)	9;
set forth at 20-23	
Oestereich v. Selective Service System, 393 U.S. 233	14
Olsen v. Nebraska, 313 U.S. 236	17
Palladio, Inc. v. Diamond, 321 F.Supp. 630 (S.D.N.Y. 1970), aff'd 440 F. 2d 1319, cert. den. 404 U.S. 983	13, 18
Pet. of N. Y. Trap Rock Corp., 172 F.Supp. 638 (S.D.N.Y. 1959)	16
Revel v. American Export Lines, Inc., 162 F.Supp. 279 (E.D. Va.), aff'd 266 F. 2d 82	16

	PAGE
Rice v. Santa Fe Elevator Corp., 331 U.S. 218	10, 11
Santa Cruz Oil Corp. v. Milnor, 130 P. 2d 256, 55 Cal. App. 2d 56 (1942)	4
Shell Oil Co. v. S.S. Tynemouth, 211 F.Supp. 908 (E.D. La. 1962)	16
Skiriotes v. Florida, 313 U.S. 69	4
Slaughter-House Cases, 83 U.S. 81	3
Southern Pacific Co. v. Jensen, 244 U.S. 205	15, 16, 17
State v. Ruvido, 15 A. 2d 293, 137 Me. 327 (1940)	4
Swift & Co. v. Wickham, 230 F.Supp. 398 (S.D.N.Y. 1964), cert. den. 385 U.S. 1036	11, 12
Terminal Railroad Assn. of St. Louis v. Brotherhood of R. Trainmen, 318 U.S. 1	8, 11
United States v. Maine, Orig. No. 35	4
Victory Carriers, Inc. v. Law, 404 U.S. 202, reh. den. 404 U.S. 1064	16

STATUTES CITED

Admiralty Extension Act of 1948 (46 U.S.C. § 740) ..	16
Federal Limitation of Liability Act of 1853, 46 U.S.C. § 183	17
28 U.S.C. § 1333	17
Federal Water Pollution Control Act, 33 U.S.C. § 1151 et seq.	10
Water Quality Improvement Act of 1970, 33 U.S.C. § 1161	9, 13, 14
Submerged Lands Act of 1953, 43 U.S.C. § 1311	4

TABLE OF CONTENTS

V

PAGE

Laws of Florida, Chapter 70-244	1, 3, 7, 14, 18
New York Public Health Law, Section 1221 (2)	1
1250	1
1251	1
1252	1

BLEED THROUGH POOR COPY

IN THE
Supreme Court of the United States

No. 71-1082

REUBIN O'D ASKEW, et al.,

Appellants,

against

THE AMERICAN WATERWAYS OPERATORS, INC., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
OF THE MIDDLE DISTRICT OF FLORIDA

**BRIEF OF THE STATE OF NEW YORK, JOINED BY THE
STATES OF CONNECTICUT AND DELAWARE, AS
AMICI CURIAE IN SUPPORT OF REVERSAL**

Interest of the Amicus

The State of New York has long been a leader in the enactment of legislation designed to protect the health, safety, and welfare of its citizens from the harmful effects of pollution. Section 1221(2) of the New York Public Health Law prohibits the discharge of oil and other specified pollutants into the territorial waters of New York, and in §§ 1250, 1251 and 1252, civil and criminal penalties are imposed for such a violation. At present legislation is pending in New York which would impose absolute liability on those responsible for the discharge of oil into the territorial waters of the State. This proposed legislation has certain similarities with Chapter 70-244, Laws of Florida, 1970, the statute under consideration here.

The devastating and long-lasting damage to beaches, harbors and coastal wetlands wrought by oil spills has been demonstrated all too frequently in recent years and is now a matter of which judicial notice may be taken. Substantial damage has been done to the coastal waters of New York, in Long Island Sound and elsewhere, by the spillage of large quantities of oil from tankers and other sources. Future damage threatens to be more widespread, especially if leases for oil drilling along the Atlantic seaboard on the Outer Continental Shelf are granted. Such leases are now being considered. The severe effects of such oil pollution on coastal lands, fisheries and waterfowl have already been demonstrated in the Santa Barbara Channel and the Gulf of Mexico, and it is our position that the states, under the ample authority of their police powers, may prohibit oil pollution of the coastal waters within their territorial jurisdiction just as they may prohibit the discharge of other hazardous and polluting substances into their air and waters.

Because of New York's vital concern with the preservation and protection of its waters and coastal lands, and in view of the State's interest in enacting legislation to impose strict liability on oil spills within New York's territorial waters, New York views the outcome of this litigation with deep interest. We are concerned with the effect that appellees' challenge to the Florida Act, if successful, might have on New York's efforts to protect its shoreline and coastal waters, and the environmental and economic interests represented therein, from one of the most harmful forms of pollution known to man—oil pollution. The decision in this litigation may therefore have a substantial effect on the health, safety, welfare, and legal rights of the citizens of New York State and our sister states. Indeed, a determination that the coastal states are without power to protect their territory from this hazard would deal a debilitating blow to their efforts to protect their environment from this most virulent form of pollution.

ARGUMENT

Chapter 70-244 of the Laws of Florida, 1970, is a valid exercise of the State's police power to protect its natural resources and the health and livelihood of its citizens. It does not unconstitutionally interfere with Federal admiralty or maritime jurisdiction, nor does it operate in a field preempted by Congress.

A.

The nature of the Florida statute

The Court below erred grievously in treating this statute as an "unlawful intrusion into the exclusive federal admiralty domain" (App. p. 42). That amounted to a distortion of the act, which is directed at the pollution of beaches, shoreline and coastal waters caused by spills of oil and other viscous liquids—not at navigation or admiralty. The act prohibits such discharges into the beaches and coastal waters of Florida (Ch. 70-244, Section 4), licenses terminal facilities (refineries, oil storage tanks, and the like), and imposes strict liability on oil spills within the state's boundaries, whether from terminal facilities or from vessels. The regulation of these fundamental areas is within the very core of the state's police power, which extends to all the great public needs, *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, including the protection of the state's coastlines, beaches, fisheries, shellfish and territorial waters, and the natural resources contained therein, from irreparable damage caused by the discharge of oil into said waters. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (smoke control); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (dredging and excavating). Ever since the historic *Slaughter-House Cases*, 83 U.S. 81, it has been universally recognized that the states may take reasonable steps to regulate private industry so as to prevent occurrences dangerous to the public health.

The courts have consistently upheld the right of states to protect their fisheries within their territorial waters, as does the Florida statute challenged here. See, e.g., *Mirkovich v. Milnor*, 34 F. Supp. 409 (N.D. Cal. 1940); *State v. Ruvido*, 15 A. 2d 293, 137 Me. 327 (1940); *In re Marincovich*, 192 Pac. 156, 48 Cal. App. 474 (1920); *Santa Cruz Oil Corp. v. Milnor*, 130 P. 2d 256, 55 Cal. App. 2d 56 (1942); *Commonwealth v. Manchester*, 25 N.E. 113, 152 Mass. 230 (1890); See also *Skiriotes v. Florida*, 313 U.S. 69. These decisions unequivocally hold that the states have the right to legislate to protect their fisheries and other resources in their territorial waters. The authority of the states to license and regulate commercial fishing within the three-mile limit has been repeatedly upheld as a valid exercise of the police power of the state. In view of the serious danger to public health and natural resources posed by pollution resulting from oil spills—pollution of watercourses, killing of fish and shellfish, pollution of shellfish beds, and destruction of beaches and coastal wetlands—it would be anomalous indeed were this Court to sustain the states' authority over fishing while denying the states power to control oil spills which have the capability to destroy fisheries and shellfish grounds for years.

The minimum extent of the states' territorial jurisdiction is delineated by the Submerged Lands Act of 1953, 43 U.S.C. § 1311, which codifies the states' exclusive jurisdiction over submerged lands from the shoreline to the three-mile limit.* The effect of the amazing and regressive decision of the District Court, however, would be to completely divest the states of their legal rights to safeguard their own territorial waters within the three-mile limit and the health of their citizens.

* It is the position of New York as well as Florida and the other Atlantic coastal states that their jurisdiction in fact extends to the outer limit of the Continental Shelf. See *United States v. Maine*, Orig. No. 35, presently pending before this Court. That issue is not before the Court in this case.

The statute is a valid exercise of the police power

The decision below in an unprecedented and anachronistic way undercuts the states' authority to protect their very shores from pollution. In the exercise of its police power, the states may act, in maritime and interstate commerce activities, concurrently with the Federal government, except in fields preempted by Congress. In *Huron Portland Cement Co. v. City of Detroit*, *supra*, 362 U.S. 440, this Court upheld a local Smoke Abatement Code that applied to ships' boiler stacks, even though the boilers had already been inspected and licensed by the federal government. At 442 this Court noted:

"The ordinance was enacted for the manifest purpose of promoting the health and welfare of the city's inhabitants. Legislation designed to free from pollution the very air people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power. In the exercise of that power, the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the Federal Government."

We have progressed far beyond the era when the Federal government's jurisdiction over maritime and interstate commerce activities, like the due process clause, was used to strike down state health and sanitary regulations, factory inspections, and safety regulations for transportation and industry. *Ferguson v. Skrupa*, 372 U.S. 726, 729-732; *Huron Portland Cement Co. v. City of Detroit*, *supra*, 362 U.S. at 448. See also *Albina Engine & Machine Works, Inc. v. Hershey Chocolate Corp.*, 295 F. 2d 619, 622 (9th Cir. 1961) (upholding city regulation of welding and burning aboard ships). As long ago as *Morgan's Steamship Company v. Louisiana Board of Health*, 118 U.S. 455, this Court upheld the right of Louisiana to protect its residents from cholera, yellow fever, and other diseases by requiring

all vessels entering New Orleans to submit to a health inspection and the payment of an inspection fee. And since "[t]he police power of the State is the least limitable of all the powers of government" (*Matter of Engelsheer v. Jacobs*, 157 N.E. 2d 626, 627, 5 N.Y. 2d 370 [1959], cert. den. 360 U.S. 902), it has been held, as this Court pointed out in *Huron Portland Cement Co. v. City of Detroit*, *supra*, 362 U.S. at 447-448:

"[A] federally licensed vessel is not, as such, exempt from local pilotage laws, *Cooley v. Board of Wardens of Port of Philadelphia*, 12 How. 299, or local quarantine laws, *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U.S. 455, or local safety inspections, *Kelly v. Washington*, 302 U.S. 1, or the local regulation of wharves and docks, *Packet Co. v. Catlettsburg*, 105 U.S. 559. Indeed, this Court has gone so far as to hold that a state, in the exercise of its police power, may actually seize and pronounce the forfeiture of a vessel 'licensed for the coasting trade, under the laws of the United States, while engaged in that trade.' *Smith v. Maryland*, 18 How. 71, 74. The present case obviously does not even approach such an extreme, for the Detroit ordinance requires no more than compliance with an orderly and reasonable scheme of community regulation. The ordinance does not exclude a licensed vessel from the Port of Detroit, nor does it destroy the right of free passage. We cannot hold that the local regulation so burdens the federal license as to be constitutionally invalid."

Here, this language is even more apt. The Florida statute requires only that oil and gas drilling, storage and refinery facilities, as well as vessels traversing the territorial waters of the State, should assume full responsibility for any damage they may cause to the fisheries and other resources of the people of the state and that such terminal facilities and vessels be adequately insured to that end. The Florida law does not destroy the right of free pas-

sage or exclude any licensed vessels from the ports of Florida so long as the vessels comply with the minimum safety requirements enacted to protect the state's citizens from the devastation of oil spills.

In *Kelly v. Washington*, 302 U.S. 1, where this Court upheld the right of that State to require a safety inspection of all tug-boats plying its navigable waters, the Court held (at p. 14):

"When the State is seeking to prevent the operation of unsafe and unseaworthy vessels in going to and from its ports, it is exercising a protective power akin to that which enables the State to exclude diseased persons, animals and plants. These are not proper subjects of commerce, and an unsafe and unseaworthy vessel is not a proper instrumentality of commerce. When the State is seeking to protect a vital interest, we have always been slow to find that the inaction of Congress has shorn the State of the power which it would otherwise possess."

The catastrophic public health, environmental and economic effects of unregulated oil spills on the victimized state and its citizens render this reasoning and holding equally applicable here.

The Court below disregarded the plain wording of the statute, which by its terms deals not only—or even primarily—with navigation, but with prohibiting "[t]he discharge of oil, petroleum products, their by-products, and other pollutants into or upon any coastal waters, estuaries, tidal flats, beaches and lands adjoining the seacoast of the state . . ." (Ch. 70-244, § 4). The act goes on to license terminal facilities, defined as waterfront facilities "other than vessels not owned or operated by such facility," used to drill, pump, store or refine oil (*id.* §§ 3[9], 6[1]). The provisions prohibiting discharge of pollutants and imposing liability therefor are applicable to terminal facilities as well as to vessels. Liability is

incurred only where pollutants are discharged into or upon the lands or coastal waters of the state (*id.* § 4), and the "powers and duties" of the State's agents are expressly limited "to the boundaries of the state" (*id.* § 5[2]). The entire thrust of the act is not to regulate navigation or commerce but to protect against oil spills and other unlawful discharges of pollutants, from terminal facilities as much as from vessels. To adopt the view that the states are powerless to so protect their beaches, harbors and fisheries would be tantamount to holding them forbidden by the clause forbidding undue burdens on interstate commerce to regulate safety on their highways and streets. See *Chrysler Corp. v. Tofany*, 419 F. 2d 499 (2d Cir. 1969) (upholding state regulation of auto headlights); *Brotherhood of L. Firemen v. Chicago, R. I. & P. R. Co.*, 393 U.S. 129 (full-crew laws); *Maner v. Hamilton*, 309 U.S. 598 (state regulation of truck weights).

And as the Court held in *Chrysler Corp. v. Tofany*, *supra*, 419 F. 2d at 511, "it is well-settled that where the state's police power is involved, preemption will not be presumed."

In *Terminal Railroad Assn. of St. Louis v. Brotherhood of R. Trainmen*, 318 U.S. 1, 6-7, this Court held, with striking applicability to the case at bar:

"State laws have long regulated a great variety of conditions in transportation and industry, safety devices and protections, purity of water supply, fire protection, and innumerable others. . . . [W]e would hardly be expected to hold that the price of the federal effort to protect the peace and continuity of commerce has been to strike down state sanitary codes, health regulations, factory inspections, and safety provisions for industry and transportation."

In the closely comparable field of pilotage, this Court has consistently sustained State regulatory legislation as

within the police power. *Anderson v. Pacific Coast S.S. Co.*, 225 U.S. 187; *Cooley v. Board of Wardens*, 53 U.S. 299. The considerations of protection of the state's health and resources here are at least equally powerful.

The alleged interference with Federal maritime jurisdiction

The admiralty and maritime jurisdiction of the Federal government has never been inflated so as to paralyze the states from enforcing laws to prevent the pollution of their lands and coastal waters or to protect the health of their citizens. *Huron Portland Cement Co. v. City of Detroit*, *supra*, and *Kelly v. Washington*, *supra*, both make it crystal clear that state health and safety regulations otherwise valid under the police power will not be overturned on that ground. See also *New York State Waterways Assn. v. Diamond*, — F. Supp. — (W.D.N.Y., BURKE, J., decided Jan. 12, 1971)*, upholding New York's Navigation Law provisions against discharge of sewage from vessels as against a similar claim.

Indeed, the District Court, under well-established principles, should have abstained from reaching these issues at all prior to affording the state courts an opportunity to pass on the statute, since it is possible the Florida courts might construe it so as to avoid some or all of the issues here raised. *Lake Carriers' Assn. v. MacMullan*, 40 L.W. 4569, 4573.

The Court below placed great reliance on the Water Quality Improvement Act of 1970 (33 U.S.C. § 1161) as "tangible evidence that the Florida Act is an unconstitutional intrusion" (App. p. 41). But this is belied by the terms of the Federal act itself. Section 1161(e) of the Act expressly provides that the Federal statute shall not be construed to preempt the right of a state to impose

* A copy of that decision is annexed hereto as an appendix to this brief at pp. 20-23.

"any other requirement or liability" with respect to the discharge of oil into the territorial waters of the state. Congress, far from preempting the field, has actually invited the states to enact legislation to protect their own vital environmental and economic interests from the threat of oil pollution.

The Florida statute represents a reasonable effort by the State to protect its own waters from pollution. In the Federal Water Pollution Control Act, 33 U.S.C. §§ 1151 *et seq.*, *in pari materia* with the 1970 Act, Congress specifically recited and reiterated the traditional powers and responsibilities of the states in this area (§ 1151[b]):

"In connection with the exercise of jurisdiction over the waterways of the Nation * * *, it is declared to be the policy of Congress to recognize, preserve and protect the primary responsibilities and rights of the States in preventing and controlling water pollution, * * *."

Again (§ 1151[c]):

"Nothing in this chapter shall be construed as impairing or in any manner affecting the right or jurisdiction of the States with respect to the waters * * * of such States."

And § 1160(b) provides:

"State and interstate action to abate pollution of interstate or navigable waters shall be encouraged and shall not * * * be displaced by Federal enforcement action."

Since this Court has repeatedly held that federal preemption of the "historic police power of the States" will not be decreed "unless that was the clear and manifest purpose of Congress," *Rice v. Santa Fe Elevator Corp.*, 331

U.S. 218, 230, it is clear that the Florida statute in issue must stand as a valid constitutional exercise of that state's inherent powers. See also *Department of Health v. Passaic Valley Sewage Commission*, 242 A. 2d 675, 679-680, 100 N.J. Super. 540 (1968), aff'd 253 A. 2d 577, 105 N.J. Super. 565:

"[N]o legislation is extant which has whittled away the power of the State or its agency, the Department, so as to deprive the Department of jurisdiction over pollution prevention in the New Jersey waters of upper New York Bay * * *."

See also *Albina Engine and Machine Works, Inc. v. Hershey Chocolate Corp.*, 295 F. 2d 618, 622, *supra*:

"We find no conflict nor any Federal intent in preventing the City of Portland from legislating in this area [regulation of welding or burning aboard ships] in which the City's interest so obviously appears."

Absent Congressional intent to create an exclusive system of regulation, the presumed validity of the Florida statute should be upheld. *Swift & Co. v. Wickham*, 230 F. Supp. 398, 406 (S.D.N.Y. 1964), cert. den. 385 U.S. 1036 (upholding State regulation of weights of fowl despite Federal Poultry Products Inspection Act). See also *Terminal R. Assn. of St. Louis v. Brotherhood of R. Trainmen*, *supra*, 318 U.S. 1, 7 (rejecting a claim that the Railway Labor Act preempted state laws regulating working conditions).

The Court below strangely insisted that the fact that the statute concerns itself with water pollution from, among other sources, vessels, in some way acted as a talisman to remove its subject-matter from the state's jurisdiction. But the fact that navigable waters are involved no more deprives the state of authority than does the fact that commerce is involved bar the states from regulating highways, or foodstuffs, or air pollution. This Court has, as we have shown, consistently rejected such arguments. The recent public concern over protection of the environment, coupled

with the advent of supertankers and the granting of leases for offshore oil drilling, has prompted legislation such as Florida's which concededly regulates, among other things, discharges from ships in its territorial waters. The legal footing of such legislation is as solid as is that supporting state regulation of emissions from motor vehicles or from factories engaged in interstate commerce.

The Water Quality Improvement Act does not preempt this field or divest the state of jurisdiction to protect its beaches and harbors

The District Court confusingly interwove the plaintiffs' claims of "interference with navigation" and of "preemption." This was symptomatic of its failure to properly weigh the state's profound interest in protection of its natural resources and economy as well as the health of its citizens. In fact the Court below ignored the powerful presumption of constitutionality of the statute, *McDonald v. Board of Election Commissioners*, 394 U.S. 802, 809, and stretched the language of the Water Quality Improvement Act in a seeming effort to create Federal preemption where none exists, and where Congress clearly expressed its intent that none exist.

In determining whether the Federal act preempted the entire field, the District Court should have commenced with the premise that only where the Federal and state acts inevitably collide, or where Congress has unmistakably expressed its intent to occupy the field, is preemption to be inferred. *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142. Instead it sought out conflict where none exists, ignoring the host of recent cases in which, on comparable facts, this Court has rejected the claim of preemption. *Swift & Co. v. Wickham*, *supra*, 230 F. Supp. 398, 406, cert. den. 385 U.S. 1036 (upholding state poultry-weight regulations as against claim of preemption by Food & Drug Act); *A.E. Nettleton Co. v. Diamond*, 264 N.E. 2d 118, 27 N.Y. 2d 182 (1970), app. dism. *sub nom. Reptile*

Products Assn. v. Diamond, 401 U.S. 969 (upholding state endangered species legislation although broader than Federal law); *Palladio, Inc. v. Diamond*, 321 F. Supp. 630 (S.D.N.Y. 1970), *aff'd* 440 F. 2d 1319, cert. den. 404 U.S. 983. See also *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, — U.S., —, 92 S. Ct. 1349; *Chrysler Corp. v. Tofany, supra*, 419 F. 2d 499. In the *Evansville Airport* case this Court aptly held that state departure taxes do not "conflict with any federal policies furthering uniform national regulation of air transportation. No federal statute or specific Congressional action or declaration evidences a Congressional purpose to deny or pre-empt state and local power to levy charges designed to help defray the costs of airport construction and maintenance." 92 S. Ct. 1349, 1357.

The Federal act dovetails with rather than conflicts with the state law here. It sets forth as "the policy of the United States that there should be no discharges of oil into or upon the navigable waters of the United States [or] adjoining shorelines" (33 U.S.C. § 1161[b][1])—the precise goal of the Florida statute. The Federal law repeatedly emphasizes cooperation with the states, as in the National Contingency Plan for removal of oil (*id.* § 1161[c][2]) ("assignment of duties and responsibilities among Federal departments and agencies in coordination with State and local agencies, including, but not limited to, water pollution control, * * *").

Again, abatement action by United States attorneys is to be taken "[i]n addition to any other action taken by a State or local government" (*id.* § 1161[e]). And, most precisely on point here, the Federal act states (*id.* § 1161[o]):

"(1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or

agency under any provision of law for damages to any publicly-owned or privately-owned property resulting from a discharge of any oil or from the removal of any such oil.

(2) Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil into any waters within such State. • • •

Had Congress sought to deprive the states of authority in this area it would hardly have explicitly provided over and over again for state action.

The distinctions drawn by the Court below between the Water Quality Improvement Act and the state law (App. pp. 42-43) are inapposite for several reasons. In the first place the Florida act, like the Federal law, excuses oil spills caused by an act of God, an act of war or the fault of a third party. See § 11(6)(c), explicitly permitting the person determined to be liable to obtain reimbursement if the State finds the occurrence was the result of any of these events.*

And while the state act imposes liability for cleanup costs upon the polluter without the monetary ceiling created by the Federal statute, there is nothing in the Federal act which prohibits the states from going further than the limited liability set forth in § 1161(f). The same is true as to remedies for damage caused by discharges

* Although the Court below made much of the provision of the Florida act that "[t]he findings of the department shall be conclusive" as to a claim for reimbursement in case of a non-negligent spill, this is a distinction without a difference. The courts have consistently read into such statutory language provision for judicial review to ensure against arbitrary action. See, e.g., *Oestereich v. Selective Service System*, 393 U.S. 233; *Gonzalez v. Freeman*, 334 F. 2d 570, 118 U.S. App. D.C. 180 (1964); *Matter of Guardian Life Ins. Co. v. Bohlinger*, 124 N.E. 2d 110, 308 N.Y. 174, 183 (1954), rearg. den. 125 N.E. 2d 867, 308 N.Y. 810.

aside from cleanup costs. As to this the Federal law is silent, leaving "undisturbed," in the language of the Court below (App. p. 42), the remedies the states make available. There is nothing in the Constitution or any Federal law which deprives a state of authority to provide for liability for damage occasioned by an oil spill without the necessity of proving negligence, so long as such liability is referable only to damage done within the borders of the state.

The District Court's heavy reliance on *Southern Pacific Co. v. Jensen*, 244 U.S. 205, was misplaced. In the first place that decision dealt with injuries on shipboard. The statute here attacked is addressed to damage resulting from oil spills from all sources—onshore facilities as well as ships. The lower court repeatedly treated this case as one involving navigation only.

Moreover, *Jensen*, a product of an earlier period in which the states' police power in the economic field was narrowly defined, and dealing with a field utterly alien to the case at bar and one in which entirely different considerations obtain, held that a state workmen's compensation law did not extend to injuries which occurred in navigable waters, even though there was then no equivalent Federal remedy. The *Jensen* decision, utterly inapplicable to the case at bar, was in any event severely sapped by *Davis v. Department of Labor*, 317 U.S. 249, reh. den. 317 U.S. 713, in which this Court held it constitutional to permit recovery under a state workmen's compensation law even though the decedent was engaged in a maritime occupation and the accident had occurred on a navigable body of water. Although the Court did not expressly overrule *Jensen*, *Jensen's* continuing vitality is open to serious question even in the field where it applies.

In *Davis*, the Court stated (317 U.S. 249 at 257):

"We find here a state statute which purports to cover these persons, and which indeed does cover them if

the doubtful and difficult factual questions to which we have referred are decided on the side of the constitutional power of the state. The problem here is comparable to that in another field of constitutional law in which courts are called upon to determine whether particular state acts unduly burden interstate commerce. In making the factual judgment there, we have relied heavily on the presumption of constitutionality in favor of the state statute. *South Carolina Highway Dept. v. Barnwell Bros.*, 303 U.S. 177, 188, 191."

Therefore, as to injuries occurring in a maritime occupation, if there are sufficient contacts with the state, the employee may recover under the state statute rather than the Federal. See *Victory Carriers, Inc. v. Law*, 404 U.S. 202, reh. den. 404 U.S. 1064, in which this Court held state rather than Federal maritime law applicable to a suit by a longshoreman involving an accident sustained on shore, noting that state law governs "where a ship or its gear, through collision or otherwise, caused damage to persons ashore or to bridges, docks or other shore-based property." 404 U.S. at 209. Although the Court noted that the Admiralty Extension Act of 1948 (46 U.S.C. § 740) was enacted to "overrule or circumvent" that doctrine, that statute was intended to provide a Federal remedy, not to destroy remedies under state statutes. *Shell Oil Co. v. S.S. Tynemouth*, 211 F. Supp. 908, 910 (E.D. La. 1962); *Revel v. American Export Lines, Inc.*, 162 F. Supp. 279, 283 (E.D. Va.), aff'd 266 F. 2d 82; *Pet. of N.Y. Trap Rock Corp.*, 172 F. Supp. 638, 646 (S.D.N.Y. 1959).

Again, see *Hahn v. Ross Island Sand & Gravel Co.*, 358 U.S. 272, reaffirming the decision in *Davis*, and permitting the employee to sue his employer in the state courts for negligence, though the employer was covered by the Federal statute but had elected not to be covered by the state plan. Thus the reliance of the lower court on *Jensen* was

incongruous and betrayed a narrow, archaic view of the states' police power which has been discarded by this Court ever since *Olsen v. Nebraska*, 313 U.S. 236, and other decisions of more than a generation ago. The insistence of the lower court that *Jensen* is dispositive here is reminiscent of the insistence of the challengers of the state statute in *Ferguson v. Skrupa*, 372 U.S. 726, 728-730, that that case was governed by the long-since discredited *Adams v. Tanner* (244 U.S. 590).

In this connection it is well to note that 28 U.S.C. § 1333, conferring admiralty and maritime jurisdiction on the Federal courts, was enacted explicitly "saving to suitors in all cases all other remedies to which they are otherwise entitled." Under this statute the state and Federal courts have concurrent jurisdiction, *American Manufacturers' Mut. Ins. Co. v. Manor Investment Co.*, 286 F. Supp. 1007 (S.D.N.Y. 1968); *Chambers-Liberty Counties Naval Dist. v. Parker Bros. & Co.*, 263 F. Supp. 602, 605 (S.D. Tex. 1967), and absent clearly expressed Congressional language, an intent to divest the states of jurisdiction under their police power should not lightly be inferred.

The weight placed by the District Court on the Federal Limitation of Liability Act of 1853, 46 U.S.C. § 183, is inexplicable. That statute simply restricted the liability of shipowners to the extent of their investment in cases where the damage occurred without their knowledge. It in no way prevents states from enacting liability statutes of their own relating to damage within the state, and there is nothing in the Limitation of Liability Act which states otherwise. Over and above this, the materiality of that Act is highly questionable. It was enacted at a time when the protection and nurturing of this country's developing shipping industry was a vital interest, and environmental considerations as we know them today were undreamed of.

All this aside, this Court has consistently held that conflicts between Federal and state statutes should not be sought out simply because the Federal and state statutes

are not perfectly symmetrical. And the state's right to legislate on all subjects relating to the health, safety, and welfare of its citizens should not be restricted except where Congress has unmistakably voiced its intent to do so. *A. E. Nettleton Co. v. Diamond*, *supra*, 264 N.E. 2d 118, 27 N.Y. 2d 182, app. diss. *sub nom. Reptile Products Ass'n v. Diamond*, 401 U.S. 969; *Palladio, Inc. v. Diamond*, *supra*, 321 F. Supp. 630, aff'd 440 F. 2d 1319, cert. den. 404 U.S. 983, where the courts upheld the constitutionality of the New York endangered species statute even though the state law was more stringent than the Federal prohibitions.

The District Court here repeatedly begged the question whether the Florida statute was within the "admiralty jurisdiction." The act is, as we have shown, in fact not limited to seagoing vessels at all but applies to oil discharges from on-shore facilities, docks, drilling rigs, and barges and other sources concededly not within the Federal admiralty jurisdiction.* Here the state has plenary responsibility, consistently expressed by its Legislature, to protect its waters, harbors, wetlands and beaches from oil spills, over and above whatever remedies may exist under Federal law. The regressive, grudging view of the police power espoused by the District Court would leave the states remediless at a time of rapidly increasing threats to their shores.

* Even assuming, *arguendo* only, that some conflict existed where vessels were involved, the District Court should have either declined to exercise jurisdiction until such issue was squarely before it, or, at most, and mindful of the statute's severability clause (§ 23), limited its decision to those portions of the act which relate to such vessels, leaving the remainder intact.

CONCLUSION

The decision of the District Court should be reversed, and the Statute declared to be constitutional in all respects.

Dated: New York, New York, June 9, 1972.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
*Attorney for State of New York,
Amicus Curiae*

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

PHILIP WEINBERG
JAMES P. CORCORAN
Assistant Attorneys General
of Counsel

The following Attorneys General join in the submission of this brief:

Connecticut

HON. ROBERT K. KILLIAN
Attorney General
Hartford, Connecticut

Delaware

HON. LAIRD W. STABLER, JR.
Attorney General
Wilmington, Delaware

APPENDIX***New York State Waterways Assn. v. Diamond.***

**Opinion, United States District Court, Western District
of New York (Burke, D.J.).**

Plaintiffs on July 13, 1971 filed an amended complaint asking for a declaratory judgment and injunctive relief. They ask this court to convene a three judge court pursuant to Section 2284 of Title 28, U.S.C., that Section 33-C of the Navigation Law of New York and the regulation promulgated, as applied to plaintiffs' watercraft, be declared unconstitutional in whole or in part, that the court enjoin temporarily and permanently the defendants, collectively and individually, from enforcing the provisions of Section 33-C of the Navigation Law, and particularly the criminal provisions thereof, and an injunction pending this suit.

This court fixed a date for a hearing on plaintiff's application for a preliminary injunction.

The defendants by notice of motion dated August 18, 1971 moved to dismiss the complaint on specific grounds stated, among which are that this court lacks jurisdiction over the subject matter, that the action is premature, and that this court should abstain from taking jurisdiction under the doctrine of equitable abstention. The motions came on for a hearing and oral argument. The respective parties have filed written memoranda.

FINDINGS OF FACT

1. Section 33-c of the New York Navigation Law was enacted by the New York State Legislature in 1966 (Laws of 1966, Chapter 897). It prohibits the placing, throwing, deposit or discharge into the waters of New York State,

from any watercraft, marine or mooring, of any "sewage or other liquid or solid materials which render the water unsightly, noxious or otherwise unwholesome so as to be detrimental to the public health or welfare or to the enjoyment of the water for recreational purposes." It prohibits the use of marine toilets on watercraft on the water of New York State "unless the toilet is equipped with facilities that will adequately treat, hold, incinerate or otherwise handle sewage in a manner that is capable of preventing water pollution, as required by this section." This provision went into effect March 1, 1970. The plaintiff contends that the statute is unconstitutional on the grounds that it conflicts with certain provisions of the Federal Water Quality Improvement Act and Water Pollution Control Act, creates an unconstitutional burden on interstate commerce, and is unconstitutionally vague and discriminatory.

2. This court declines to convene a three judge court as demanded in the complaint.

3. The plaintiffs do not sue for money damages, but only for a declaratory judgment and injunctive relief. They assert that this is a case involving also the admiralty and maritime jurisdiction of this court. Admiralty cannot give injunctive relief, *Khedivial Line vs. Seafarers' Int. Union*, 278 F.2d 49 (2 Cir. 1960); nor can it issue a declaratory judgment. This is not a case involving admiralty or maritime jurisdiction nor have the plaintiffs alleged any other valid basis for jurisdiction of this court. This court lacks jurisdiction over the subject matter of the suit.

4. The Federal Water Pollution Control Act, 33 U.S.C. Section 1151 et seq., does not evidence congressional intent to preempt this field or to exclude state action at this time.

5. There is no merit to the argument of the plaintiffs that the state is powerless to act to protect the health and

welfare of its residents during the period prior to the effectiveness of federal standards.

6. There is no merit to the claim of the plaintiffs that the statute constitutes an unconstitutional burden on interstate commerce.

7. There is no merit to plaintiffs' claim that Section 33-C could result in the impairment of contractual rights.

8. There is no merit to plaintiffs' claim that the provisions of Section 33-C permitting boarding and inspection of watercraft by state agents without a prior warrant constitutes a violation of the Fourth Amendment prohibition against warrantless searches. Moreover, none of the plaintiffs has been made the victim of an allegedly unconstitutional search nor has such a search been threatened, nor has the statute been enforced against any of them. When and if any plaintiff is prosecuted for violation of Section 33-C, and if that prosecution resulted from a search of its vessel without a warrant, it will then have an opportunity to raise its Fourth Amendment claims, if applicable, as a defense in a criminal prosecution.

9. Section 33-C fully complies with the constitutional requirements of due process and equal protection under the Fourteenth Amendment. Neither the complaint nor the amended complaint raises any substantial federal question.

10. Even if this court did have jurisdiction, it should abstain from exercising such jurisdiction in the circumstances of this case. *Reetz vs. Bozanich*, 397 U.S. 82; *Zwickler vs. Koota*, 389 U.S. 241. No state court has ever had an opportunity to interpret and construe the statute and procedures under attack here.

CONCLUSION OF LAW

1. Plaintiffs' motion for a preliminary injunction is denied. It is HEREBY SO ORDERED.

It is HEREBY ORDERED, ADJUDGED and DECREED that the complaint and the amended complaint herein are dismissed.

HAROLD P. BURKE
HAROLD P. BURKE
United States District Judge

January 12, 1972.

SUBJECT INDEX

Opinion Below	1
Questions Presented	2
Statutes Involved	3
Statement of the Case	4
Argument: Point I The fact the judicial power of the United States is extended "to all Cases of admiralty and maritime jurisdiction" by Article III, Section 2, of the Constitution does not impose a permanent barrier in the path of State legislatures seeking to protect citizens, property, ecology, economy and general welfare from the deleterious effects of massive oil-spill pollution of State waters	20
A. Preliminary Statement	20
(1) The subject is water and the need to conserve it	22
(2) The subject is also preservation of other resources and the State's right and duty to protect them from oil pollution	25
B. The District Court's Error	31
(1) Absolute liability without fault is the <i>sine qua non</i> of protection against oil-spills, and the cornerstone of objections to the Florida Act	32
C. Police Power is Power to Protect	41
(1) If the State cannot secure a remedy when its citizens have been wronged, then the police power of the State is little more than an academic curiosity	42
(2) Power to protect shore property and the State's natural resources from deleterious effects of a massive oil-spill was reserved to the State	49
D. Extension of Admiralty: Outside the Limits	51
(1) By extending scope of maritime tort jurisdiction beyond the <i>locality</i> of navigable waters, Congress has exceeded Admiralty Clause authority and intruded upon the State's prerogatives	52
(2) Should this Court decide the Admiralty Extension Act to be valid on its face, traditional common law jurisdiction saved to suitors in 28 U.S.C. § 1333 marks a preserve of concurrent State authority	55
(3) To the extent that Federal law fails to protect citizens of the State from loss of property and damage to natural resources, the State has a right and a duty to legislate in the area of marine oil-spill pollution control	58
E. The Jensen Doctrine In Inapplicable	61
(1) <i>Jensen's</i> absolute prohibitions against State legislation affecting maritime commerce must remain limited to the arena of its own facts	61

F. Limitation of Liability Means No Recovery	63
(1) In a conflict of interests between the State in protecting against effects of an oil-spill, and the Maritime in protecting shippers from claims resulting therefrom, the State's interest is dominant	63
(2) Limitation of Liability in the present context is a bad use of a good legal theory	66
Argument: Point II The Water Quality Improvement Act of 1970 in no way preempted the states from imposing requirements and liabilities to protect against massive oil-spill pollution of their territorial waters—instead, it describes a joint Federal-State scheme to combat a serious economic and environmental problem	
A. Preliminary Statement	69
B. The Federal Act	71
(1) The Federal Act defines the problem and declares national policy while contemplating State participation in the enforcement of it	71
(2) If Federalism is more than an academic theory, it requires expression in the instant case	78
(3) The "gap theory" of State law filling gaps in Federal Statutory schemes is alive and well in <i>Rodrigue</i>	83
Conclusion	85

TABLE OF AUTHORITIES

Cases

<i>American Ins. Co. v. Canter</i> , 26 U.S. (1 Pet.) 511 (1828)	14,52
<i>American Waterways Operators, Inc., The v. Askew</i> , 335 F.Supp 1241 (m.D. Fla. 1971)	1,32,61,63
<i>Barracuda Tanker Corp., In re</i> , 281 F.Supp 228 (S.D.N.Y. 1968) modified 409 F.2d 1013	11,16,25,34,67
<i>Belfast, The</i> , 74 U.S. (7 Wall.) 624 (1868)	15,54
<i>Berman v. Parker</i> , 348 U.S. 26 (1954)	13,41,44
<i>Blackheath, The</i> , 195 U.S. 361 (1904)	52
<i>Campbell v. Missouri P. R. Co.</i> , 121 Mo. 340, 25 S.W. 936 (1894) ...	42
<i>Central States, The</i> , 9 F.Supp 934 (E.D.N.Y. 1935)	65
<i>Chevron Oil Co. v. Huson</i> , U.S. , 30 L.Ed.2d 296 (1971) .	19,83
<i>City of Norwich, The</i> , 118 U.S. 468 (1886)	63
<i>Cleveland Terminal & Valley RR. Co. v. Cleveland S.S. Co.</i> , 208 U.S. 316 (1908)	52
<i>Clyde Mallory Lines v. State of Alabama</i> , 296 U.S. 261 (1935)	47
<i>Coolley v. Board of Port Wardens</i> , 53 U.S. (12 How.) 299 (1851) ...	13,45,46

<i>Crowell v. Benson</i> , 285 U.S. 22 (1931)	15,41,54
<i>Eagle, The</i> , 75 U.S. (8 Wall.) 15 (1868)	14,52
<i>Escanaba v. L.M. Transp. Co. v. Chicago</i> , 107 U.S. 678 (1883)	46
<i>Genesee Chief, The</i> , 53 U.S. (12 How.) 443 (1851)	14,50,52
<i>Gibbons v. Ogden</i> , 22 U.S. (9 Wheat.) 1 (1824)	81
<i>Gilman v. Philadelphia</i> , 44 U.S. (3 Wall.) 713 (1866)	46
<i>Grand Republic, The—The Nassau</i> , 29 F.2d 37 (2d Cir. 1929)	65
<i>Grant Smith-Porter Ship Co. v. Rohde</i> , 257 U.S. 469 (1922) ...	14,53
<i>Great Lakes Dredge & Dock Co. v. Kierewjewski</i> , 261 U.S. 479 (1922)	78
<i>Griswold v. Connecticut</i> , 381 U.S. 79 (1965)	15,59
<i>Hamilton, The</i> , 207 U.S. 398 (1907)	15,50,57,64,78
<i>Hammer v. Dagenhart</i> , 247 U.S. 251 (1918)	81
<i>Harrisburg, The</i> , 119 U.S. 199 (1886)	64
<i>Healey v. Ratta</i> , 292 U.S. 263 (1934)	54
<i>Huron Portland Cement Co. v. City of Detroit</i> , 362 U.S. 440 (1960)	13,44,45,47,59,76
<i>Johnson v. Chicago & Pacific Elev. Co.</i> , 119 U.S. 388 (1886) ...	50,52
<i>Just v. Chambers</i> , 312 U.S. 383 (1941)	15,51,62,82
<i>Kelley v. Washington</i> , 302 U.S. 1 (1937)	45, 46, 47, 48
<i>Knickerbocker Ice Co., v. Stewart</i> , 253 U.S. 149 (1920)	8,13,18,49,56,77,78,82
<i>Lee v. New Jersey</i> , 207 U.S. 67 (1907)	47
<i>License Cases, The</i> , 46 U.S. (5 How.) 590 (1846)	81
<i>Liverpool, Brazil & River Plate Steam Nav. Co. v. Brooklyn E. Dist. Terminal</i> , 251 U.S. 48 (1919)	63
<i>Lottawanna, The</i> , 88 U.S. (21 Wall.) 558 (1875)	8,54
<i>Manchester v. Massachusetts</i> , 139 U.S. 240 (1890)	47
<i>Martin v. Hunter's Lessee</i> , 14 U.S. (1 Wheat.) 304 (1816)	15, 56
<i>Martin v. West</i> , 222 U.S. 191 (1911)	52
<i>Maryland Casualty Co. v. Cushing</i> , 347 U.S. 409 (1954)	74
<i>Maurer v. Hamilton</i> , 308 U.S. 598 (1939)	47
<i>Mayo v. Lakeland Highlands Can Co.</i> , 309 U.S. 310 (1939)	69
<i>McCulloch v. Maryland</i> , 17 U.S. (4 Wheat.) 159 (1819)	80
<i>McNeil, Ex parte</i> , 80 U.S. (13 Wall.) 236 (1872)	46
<i>Missouri v. Illinois</i> , 200 U.S. 496 (1906)	71
<i>Mobile County v. Kimball</i> , 102 U.S. 691 (1881)	46
<i>Moragne v. States Marine Lines, Inc.</i> , 398 U.S. 375 (1970)	8, 19,64, 83,84
<i>Morgan's Louisiana & Tennessee R. & SS. Co. v. Board of Health</i> , 118 U.S. 445 (1886)	47, 48
<i>Nebbia v. New York</i> , 291 U.S. 502 (1933)	68
<i>New Jersey Steam Navigation Co., v. Merchants Bank of Boston</i> , 47 U.S. (6 How.) 344 (1848)	66
<i>Noble State Bank v. Haskell</i> , 219 U.S. 104 (1911)	41
<i>Packet Co. v. Catlettsburg</i> , 105 U.S. 559 (1882)	46

<i>Parkersburg & Ohio River Transp. Co. v. Parkersburg</i> , 107 U.S. 691 (1883)	46,47
<i>Pennsylvania Coal Co. v. Mahon</i> , 260 U.S. 393 (1922)	68
<i>Phenix Ins. Co., Ex Parte</i> , 118 U.S. 610 (1886)	14,50,52,64
<i>Plymouth, The</i> , 70 U.S. (3 Wall.) 20 (1865)	14,50,52
<i>Port Richmond & B.P. Ferry Co. v. Hudson County</i> , 234 U.S. 317 (1914)	47
<i>Ramsey v. Allegre</i> , 25 U.S. (12 Wheat.) 611 (1827)	51,53
<i>Rebecca, The</i> , 20 F.Cas. 373 No. 11, 619 D. Me. 1831)	66
<i>Richardson v. Harmon</i> , 222 U.S. 96 (1911)	14,63,64,65,67
<i>Rodrigue v. Aetna Casualty & Surety Co.</i> , 395 U.S. 352 (1969)	1983,84
<i>Romero v. International Terminal Operating Co.</i> , 358 U.S. 354 (1959)	51,56,82
<i>Scott v. Sandford</i> , 60 U.S. (19 How.) 393 (1856)	81
<i>Skirtoes v. Florida</i> , 313 U.S. 69 (1940)	47
<i>Slaughterhouse Cases, The</i> , 83 U.S. (16 Wall.) 36 (1872)	81
<i>Sproles v. Binford</i> , 286 U.S. 374 (1931)	47
<i>South Carolina v. Barnwell Bros.</i> , 303 U.S. 177 (1937)	47
<i>Southern Pacific Co. v. Arizona</i> , 325 U.S. 761 (1944)	47
<i>Southern Pacific Co. v. Jensen</i> , 244 U.S. 205 (1917)	8,13,15,49,56,62,78,82
<i>Southshore, The</i> , 35 F.2d 110 (3rd Cir. 1929) cert. den. 281 U.S. 722 (1930)	65
<i>Standard Dredging Corporation v. Murphy</i> , 319 U.S. 306 (1943)	15,16,61,62,82
<i>St. Louis & San Francisco Ry. Co. v. Mathews</i> , 165 U.S. 1 (1896) ..	13,41,42,43
<i>Steamer St. Lawrence, The</i> , 66 U.S. (1 Black.) 522 (1862)	8,14,15,54
<i>Steamboat Thomas Jefferson, The</i> , 23 U.S. (10 Wheat.) 428 (1825)	14,52
<i>Taylor v. Carryl</i> , 61 U.S. (20 How.) 583 (1857)	15,57
<i>Thomas Barium, The</i> , 293 U.S. 21 (1934)	55
<i>Thomas v. Lane</i> , 2 Sumn. 9 (1834)	50,51
<i>Titanic, The</i> , 233 U.S. 718 (1914)	67
<i>Troy, The</i> , 208 U.S. 321 (1908)	52
<i>Tungus, The v. Skovgaard</i> , 358 U.S. 588 (1959)	56,62,64
<i>United States v. Butler</i> , 297 U.S. 1 (1935)	82
<i>United States v. Causby</i> , 328 U.S. 256 (1946)	68
<i>United States v. Darby Lumber Co.</i> , 312 U.S. 100 (1940)	82
<i>United States v. Florida</i> , 363 U.S. 121 (1960)	72
<i>United States v. Kansas City Life Ins. Co.</i> , 339 U.S. 799 (1950) ..	17,68
<i>United States v. Standard Oil Co.</i> , 384 U.S. 224 (1966)	31
<i>Victory Carriers, Inc. v. Law</i> , 404 U.S. , 30 L.Ed.2d 383 (1971) ..	14,53,54

<i>Washington v. W. C. Dawson & Co.</i> , 264 U.S. 218 (1924) . . .	18,77,82
<i>Western Fuel Co. v. Garcia</i> , 257 U.S. 233 (1921)	78
<i>Wilburn Boat Co. v. Fireman's Fund Ins. Co.</i> , 348 U.S. 310 (1955) .	76
<i>Wilmington Transp. Co. v. Railroad Commission</i> , 236 U.S.	
151 (1915)	47
<i>Zabel v. Tabb</i> , 430 F.2d 199 (5th Cir. 1970) <i>cert. den.</i> 410 U.S. 910	
(1971)	58,60

Cases Not Reported

<i>Earl Faircloth v. M/T Delian Apollon</i> (M.D. Fla.) No.	
70-47-Civ-T, February 16, 1971	30

United States Constitution

Article I, Section 8	78
Article III, Section 2	2, 3, 7, 11, 14, 46,
	49, 50, 51, 52, 53, 54, 56, 57, 78, 82
Amendment V	3, 16, 67, 68
Amendment IX	3, 15, 59, 60
Amendment X	3, 13, 48, 49, 50, 51, 80, 81, 82

Statutes—Federal

28 U.S.C.	
Section 2281	2
Section 2284(3)	2
Section 1253	2
Section 1333	4, 50, 55, 78
33 U.S.C.	
Section 1161(b)(2)	72
Section 1161(b)(3)	72
Section 1161(b)(4)	74
Section 1161(c)	74, 75
Section 1161(d)	74
Section 1161(f)(1)	65, 72, 75
Section 1161(j)(1)	73, 74, 75
Section 1161(j)(2)	73
Section 1161(n)	75
Section 1161(p)(1)	73
Section 1161(o)	75, 76
Section 1161(o)(2)	9, 18, 21, 76

42 U.S.C. Sections 4331-47, National Environmental Policy Act of 1969, P.L. 91-190 § 101(c)	58
---	----

46 U.S.C.

Sections 181-189, 9 Stat. 635	16, 63, 66, 67
Section 183	3, 10, 16, 18, 25, 33, 36, 64, 65
Section 189	3, 64, 65
Section 740	3, 14, 51, 55
Section 951, 4 Stat. 1003	55
Section 1308, 49 Stat. 1207. § 8 (1936)	68
Section 190-195, 27 Stat. 445. § 6 (1893)	68

Federal Water Quality Improvement Act of 1970, Pub. L. 91-224, 91st Congress, 2nd Session (April 3, 1970)

.....	2, 3, 4, 7, 9, 21
Section 11(a)	4
Section 11(b)	4
Section 11(f)(1)	4
Section 11(g)	4
Section 11(o)(2)	5, 8
Section 11(p)(1)	5
Section 11(p)(3)	5

Treaties

1954 <i>London International Convention for the Prevention of Pollution of the Sea by Oil</i> , as amended April 11, 1962, Annex A (1966) 17 U.S.T. 1523, T.I.A.S. No. 6109, 600 U.N.T.S. 332.	28
---	----

Statutes—State

Chapter 70-244, <i>Laws of Florida</i> , 1970	3, 5, 6, 9, 11, 12, 13, 14, 21, 58
Section 2(6)	5
Section 7(1)(a)	6
Section 7(c)	6
Section 12	6
Section 21	6, 22

Section 372.04, <i>Florida Statutes</i> (1970)	72
--	----

Chapter 376, <i>Florida Statutes</i> (1970)	58, 61
---	--------

Section 376.02(1)(2)	72
Section 376.031	33
Section 376.03(7)	72
Section 376.07	74
Section 376.11(6)	36
Section 376.11(6)(c)	72
Section 376.12	33, 35, 36, 72, 74
Section 376.14	35, 73
Section 376.16	73

Chapter 16B—16.08 Regulations, Department of Natural Resources, State of Florida	3, 6
--	------

LAW REVIEW ARTICLES

Baldwin, <i>Public Policy on Oil—An Ecological Perspective</i> , 1 Ecology L. Q. 245 (Spring 1971)	31
Bryan, <i>Water Supply and Pollution Control Aspects of Urbanization</i> , 30 Law & Contemp. Probl. 174 (1965)	23
Comment, <i>Oil Pollution of the Sea</i> , 10 Harv. Inter. Law J. 317 (1970)	20, 24, 30, 33
Comment, <i>Post Torrey Canyon: Toward A New Solution to the Problem of Traumatic Oil Spillage</i> , 2 Conn. L. Rev. 632 (1970)	25, 34
Harolds, <i>Limitation of Liability and Its Application to Pleasure Boats</i> , 37 Temp. L. Q. 423 (1964)	67
Hines, <i>Nor Any Drop To Drink: Public Regulation of Water Quality, Part I: State Pollution Control Problems</i> , 52 Iowa L. Rev. 186 (1966)	23
Mason, <i>The Supreme Court and Federalism</i> , 44 Texas L. Rev. 1187 (1966)	80
Mendelsohn, <i>Maritime Liability for Oil Pollution—Domestic and International Law</i> , 38 Geo. Washington L. Rev. 1 (1969)	31, 33, 40

Muskie, <i>Torts, Transportation, and Pollution: Do the Old Shoes Still Fit?</i> 7 Harv. Journal on Legislation 477 (1970)	69
Nanda, <i>The Torrey Canyon Disaster: Some Legal Aspects</i> , 44 Denver L. J. 400 (1967)	25, 33
Note, <i>Liability for Oil Pollution Cleanup and the Water Quality Improvement Act of 1970</i> , 55 Cornell L. Rev. 973 (1970)	26, 27, 34
Note, <i>Limitation of Liability</i> , 35 Columbia L. Rev. 246 (1935)	66
Schmidhauser, "State's Rights" and the Origin of the Supreme Court's Power as Arbiter in Federal-State Relations, 4 Wayne L. Rev. 101 (Spring 1958)	79
Shutler, <i>Pollution of the Sea By Oil</i> , 7 Houston L. Rev. 415 (1970)	28, 41

Books

Bryce, 1, THE AMERICAN COMMONWEALTH (3rd ed. 1893)	79
Carr, DEATH OF SWEET WATERS (1966)	23
Carson, THE SILENT SPRING (1962)	24
Cooley, II, CONSTITUTIONAL LIMITATIONS (8th ed. 1927)	43
Cowan, OIL AND WATER: THE TORREY CANYON DISASTER (1968)	25, 33
de Toqueville, 1, DEMOCRACY IN AMERICAN (Bradley ed. 1945)	79
Gilmore and Black, THE LAW OF ADMIRALTY (1957)	64, 66
Graham, DISASTER BY DEFAULT: POLITICS AND WATER POLLUTION (1966)	24, 71
Legare, 2, THE WRITINGS OF HUGH SWINTON LEGARE (1845)	81
Madison, 2, THE WRITINGS OF JAMES MADISON (Hunt ed. 1901)	80
Rodale, OUR POISONED EARTH AND SKY (1964)	24
Wright, THE COMING WATER FAMINE (1966)	24

Newspapers and Periodicals

<i>St. Petersburg Independent</i> , February 18, 1970	30
<i>Tampa Tribune</i> , February 16, 1970	30
Stein, <i>Problems and Progress in Water Pollution</i> , 2 Natural Resources Journal 388 (1962)	24

Other

<i>Hearings on H.R. 6495, H.R. 6609, H.R. 6794, and H.R. 7325 Before the House Committee on Merchant Marine and Fisheries, 91st. Cong., 1st Sess., 261-269 (1969)</i>	39
<i>Senate Report No. 1593, June 11, 1948 (To accompany H.R. 238); House Report No. 1523, Mar. 8, 1948, 80th Cong., 2d Sess. 1948.</i>	56
<i>United States Code Congressional and Administrative News</i> , May 5, 1970	76
<i>Legal, Economic, and Technical Aspects of Liability and Financial Responsibility as Related to Oil Pollution</i> , A Study by the Program of Policy Studies in Science and Technology, George Washington University, For the United States Coast Guard (1970)	31, 37

BLEED THROUGH POOR COPY

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-1082

REUBIN O'D. ASKEW, et al.,
Appellants,

-vs-

THE AMERICAN WATERWAYS
OPERATORS, INC., et al.,
Appellees.

On Appeal from the United States District Court
for the Middle District of Florida

BRIEF OF APPELLANTS

OPINION BELOW

The opinion of the district court is reported in *The American Waterways Operators, Inc. v. Askew*, 335 F.Supp. 1241 (M.D. Fla. 1971). A copy thereof is included herewith in the Appendix (A 39-55).

JURISDICTION

This appeal is from a final order entered in a suit for injunctive relief pursuant to 28 U.S.C. §§ 2281, 2284(3). The order was entered December 10, 1971. Notice of Appeal was filed in the United States District Court, Northern District of Florida, December 23, 1971. Jurisdiction of this Court is invoked in accordance with provisions of 28 U.S.C. § 1253, authorizing appeal from an order of a three-judge court permanently enjoining enforcement of a state statute when such order gives rise to a substantial question such as one involving conflict between state and federal interests. The Court noted probable jurisdiction on April 17, 1972. 40 L.W. 3503.

QUESTIONS PRESENTED

1. Whether the District Court erred in declaring unconstitutional a statute designed to protect the state, its citizens, and its environment from economic and ecological damage resulting from massive pollution of its territorial waters incident to an occurrence during the transport of oil or other substances by sea, on ground that in Article III, Section 2, Clause 3, United States Constitution, the states surrendered to the federal government all power to enact substantive legislation affecting maritime commerce.

2. Whether the District Court erred in construing the Federal Water Quality Improvement Act of 1970, Pub.L. 91-224, 91st Congress, 2d Session (April 3, 1970); 33 U.S.C. § 1161 et seq. as preempting the states from enacting legislation imposing absolute and unlimited liability upon owners or operators of vessels or terminal facilities which cause massive pollution of the state's territorial waters by oil or other substances.

STATUTES INVOLVED

Chapter 70-224, Laws of Florida, 1970, published as Chapter 376, *Florida Statutes* (1970), is too lengthy for inclusion verbatim, and is set out in the Appendix (A 56-73).

Chapter 16B-16.08, Regulations, Department of Natural Resources, State of Florida, promulgated in accordance with Chapter 70-244, §§ 7, 14, Laws of Florida, 1970, is set out in the Appendix (A 73-74).

The Water Quality Improvement Act of 1970, Pub.L. 91-224, 91st Congress, 2d Session (April 3, 1970), Codified as 33 U.S.C. § 1161 et seq. is also set out in appropriate part in the Appendix (A 75-90).

The Limitation of Liability Act, originally Chapter 43, Section 3, 9 Stat. 635 (March 3, 1851), amended and codified as 46 U.S.C. § 183 (1964) is set out in the Appendix (A 91-92).

46 U.S.C. § 189

§ 189. Limitation of liability of owners of vessels for debts

The individual liability of a shipowner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of vessel on account of the same shall not exceed the value of such vessels and freight pending: *Provided*, That this provision shall not prevent any claimant from joining all the owners in one action; nor shall the same apply to wages due to persons employed by said shipowners. June 26, 1884, c. 121, § 18, 23 Stat. 57.

The extension of Admiralty Act, 62 Stat. 496 (June 19, 1948), 46 U.S.C. 740, is set out in the Appendix (A 93).

Article III, Section 2, United States Constitution, the Fifth Amendment to the United States Constitution, the Ninth Amendment to the United States Constitution, and the Tenth Amendment to the United States Constitution are set out in the Appendix (A 94).

28 U.S.C. § 1333

§ 1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the states, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize. June 25, 1948, c. 646, 62 Stat. 931; May 24, 1949, c. 139, § 79, 63 Stat. 101.

STATEMENT OF THE CASE

The Water Quality Improvement Act of 1970, Pub.L. 91-224, 91st Congress, 2d Session, 33 U.S.C. § 1161 *et seq.* (hereafter "W.Q.I.A." in citation; "Federal Act" in text) became law April 3, 1970, while the Florida legislature was in annual session. The Federal Act prohibits the discharge by vessels of oil into navigable waters of the United States or the contiguous zone. W.Q.I.A. §§ 11(a), (b), *et seq.* Should such a discharge occur through willful negligence or willful misconduct within privity or knowledge of the owner or operator of the vessel, the government may recover the entire clean-up cost from the owner or operator. W.Q.I.A. § 11(f)(1). If a discharge occurs other than from willful negligence or misconduct, the government can recover clean-up costs unless the owner or operator can prove any of four defenses: act of God, act of war, negligence on the part of the government, or act or omission of a third party. W.Q.I.A. § 11(f)(1).

This strict liability is not without limitation, however. Recovery is limited to \$100 per gross ton of the vessel or \$14 million, whichever is less. W.Q.I.A. § 11(g). Consequential damages, or costs imposed by such a discharge on other than "the government," are not recoverable under the Federal Act.

The Federal Act also requires owners of vessels of more than 300 gross tons using United States ports or navigable waters to establish and maintain evidence of financial

responsibility equal to the aforementioned limits by insurance, surety bonds, qualification as a self-insurator, or other means. W.Q.I.A. § 11(p)(1). In the event of a discharge, the government may proceed directly against the insurer who has benefit of all defenses available to the vessel owner or operator. W.Q.I.A. § 11(p)(3).

Section 11(o)(2) of the Federal Act reads:

Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement of liability with respect to the discharge of oil into any waters within such State.

The Florida Oil-Spill Prevention and Pollution Control Act, Chapter 70-244, Laws of Florida, 1970; Chapter 376, Florida Statutes (1970) (hereafter referred to in citation by chapter number and in text as "Florida Act") was a Committee Substitute for Senate Bill No. 450 (A 56-73). It passed the legislature less than 90 days after the Federal Act became law, was approved by the Governor June 30, 1970, and took effect in part the following day (A 73). Provisions of the Federal Act were fresh in the minds of committee members. Federal-State cooperation is keynoted throughout the State Act.

The legislature further declares that it is the intent of this act to support and complement applicable provisions of the federal water quality improvement act of 1970¹ specifically those provisions relating to the national contingency plan for removal of oil and other pollutants. Ch. 71-244, Laws of Florida, 1970, § 2(6).

Nothing in this act shall affect in any way the right of any person who renders assistance in containing or removing oil or other pollutants to reimbursement for costs of such containment or removal under the applicable provisions of the federal water quality improvement act of 1970¹ or any rights which said person may have against any third party whose acts or omissions in any way have caused or

¹33 U.S.C.A. § 1151 et seq.

contributed to the discharge of such oil or other pollutants. Ch. 70-244, Laws of Florida, 1970, § 8(5).

This act, being necessary for the general welfare, the public safety of the state and its inhabitants, shall be liberally construed to effect the purposes set forth under this act and the federal water quality improvement act of 1970.¹ Ch. 70-244, § 21, Laws of Florida, 1970.

Limitations of the Federal Act were also fresh in the minds of state legislative committee members who recognized gaps in protection afforded by the Federal Act, and sought to fill those gaps with safeguards peculiarly necessary to Florida. Instead of liability limited by gross tonnage of an offending vessel up to an arbitrary ceiling for pollution by oil alone, the Florida Act imposes unlimited liability without fault upon vessels discharging other pollutants as well as oil while destined for or leaving any Florida port. Ch. 70-244 § 12, Laws of Florida, 1970. Instead of recovery limited to clean-up costs of the State alone, the Florida Act provides for damages "resulting from injury to others." Ch. 70-244, § 12. Terminal facilities, whether onshore or offshore, are subject to the same liability as vessels. Ch. 70-244, § 3(9). Owners and operators are liable, Ch. 70-244, § 12, and must maintain satisfactory evidence of financial responsibility measured by \$100 per gross ton of the largest vessel up to a \$5 million ceiling as opposed to the \$14,000,000 limit in the Federal Act. Ch. 16B-16.08, Regs. Department of Natural Resources, State of Florida; Ch. 70-244, §§ 7, 14. (A 73-74). Special containment gear and crews trained in use thereof are required, Ch. 70-244, § 7(1)(a), and vessels are subject to inspection by state officials to ascertain presence of such gear and to assess seaworthiness of the ship prior to entry into any Florida port. Ch. 70-244, § 7(c).

The effective date for regulatory requirements of the Florida Act, including financial responsibility and unlimited and absolute liability provisions, was extended by the Board of Natural Resources to March 15, 1971.

Suit was filed March 9, 1971, and a hearing on plaintiffs'

¹33 U.S.C.A. § 1151 et seq.

application for temporary restraining order was held March 11-12, 1971.

Plaintiffs and intervenors include merchant shippers, world shipping associations which insure an estimated three-fourths of the world's tonnage, certain members of the Florida coastal barge and towing industry, and owners and operators of oil terminal facilities and heavy industries located in Florida ports.

Defendants are members of the Cabinet of the State of Florida, before the Court in dual capacities. They were sued in their official position as highest elected officers of the state, and they were sued as members of the Board of Natural Resources. Also included are the director of the Department of Natural Resources, and a conservation officer. The State of Florida intervened as a party defendant on ground that interests to be adjudicated were much broader than those protected by the Department of Natural Resources.

At the two-day hearing on plaintiffs' application for temporary restraining order, testimony of plaintiffs' representatives revealed that not one of them had attempted to comply with the Florida Act or regulations issued thereunder, but that shippers had advised them that vessels would be diverted from Florida ports if the Act were implemented. Indeed, certain vessels had in fact been diverted to ports in other states. Testimony of an employee of the Department of Natural Resources was to the effect that some 669 vessels had been approved for traffic to and from Florida ports, their owners or operators having complied in advance with financial responsibility requirements. The temporary restraining order was subsequently entered *nunc pro tunc* to March 12, 1971.

The three-judge panel was convened and heard this cause on April 27, 1971. Judgment of the District Court was entered December 10, 1971, with a memorandum opinion finding (1) that maritime law 'evolved' under Article III, Section 2 of the United States Constitution, augmented from time to time by the federal judiciary, and changed further by congressional enactment, such as the Water Quality Improvement Act of 1970; (2) that the Federal Act is 'tangible evidence' that the Florida Act is an unconstitutional intrusion

into the federal maritime domain because it makes changes in substantive maritime law such as providing absolute and unlimited liability for owners and operators of offending vessels, and because it also contains provisions for compensating state and private parties for property damage as well as clean-up costs; (3) that oil-spill pollution is a maritime tort governed strictly by rules of admiralty law and is exclusively within the federal domain; (4) that since the Florida Act substitutes absolute and unlimited liability for admiralty's negligence and unseaworthiness tests and severely limited liability, it contravenes federally protected tenets of maritime law and is invalid upon the authority of *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917); (5) that to permit Florida to legislate in such fashion would be to 'sound the death knell to the principle of uniformity'; (6) that limited remedies and relief available under the Federal Act notwithstanding, Congress did not leave 'gaps' in oil-spill pollution laws for the states to fill in—even though the Federal Act fails to provide a remedy, the states are nonetheless precluded from creating one—under authority of *Moragne v. United States Lines, Inc.*, 398 U.S. 375 (1970); (7) that the preemption disclaimer of Section 11 (o)(2) of the Federal Act does not mean what it says because Congress lacks power to permit states to legislate requirements or liabilities with respect to discharge of oil within state waters when such legislation might tend to affect—or conflict with established rules governing—maritime commerce, on authority of *Knickerbocker Ice Company v. Stewart*, 253 U.S. 149 (1920), *The Lottawanna*, 21 Wall. 558 (1875) and *The Steamer St. Lawrence*, 1 Bl. 522 (1862); and (8) that the Florida Act must fall in its entirety, despite a severability clause, because, absent fatally defective provisions, the Act 'would not comprise a coherent legislative scheme,' a point that will not be disputed on appeal.

Notice of Appeal was filed with the United States District Court, Middle District of Florida, on December 23, 1971, and probable jurisdiction noted on April 17, 1972.

SUMMARY OF ARGUMENT

I.

A. The essential question to be decided here is to what extent a state, in the exercise of its police power, may legislate to control, establish responsibility, and assess liability for massive oil-spill pollution of its territorial waters. The District Court ruled that Florida was precluded from passing any legislation which would have an adverse effect upon or otherwise interfere with established tenets of general maritime law, and that, as to oil-spill pollution laws, Congress had preempted the field by passage of the Water Quality Improvement Act of 1970, 84 Stat. 91, 33 U.S.C. § 1161 *et seq.* (Federal Act). But the Florida Oil Spill Prevention and Pollution Control Act of 1970, Ch. 70-244, Laws of Florida, 1970; Chap. 376, Florida Statutes, (Florida Act) is a valid expression of the State's police power, protecting dominant State interests not otherwise protected under (a) maritime law, or (b) the Federal Act. Moreover, the Federal Act expressly disclaims preemption. 33 U.S.C. § 1161(o)(2).

(1)

Necessity for conserving supplies of fresh water are urgent. In the United States, approximately 650 billion gallons of water are available for use per day. By the year 2000, it is estimated that our consumption of fresh water will increase to 1000 billion gallons per day. It has been suggested that it will be necessary to re-cycle water as we do glass and aluminum, and to refine our desalinization processes, if we are to continue to exist as an American civilization.

The public was just becoming aware of the water crisis when the 60,000 gross ton tanker *Torrey Canyon* ran aground and spilled half its cargo, an estimated 450,000 barrels of crude oil, into the English Channel. World-wide attention was focused on efforts of Great Britain and France to control and abate the massive oil-slick. The R.A.F. finally bombed the wreck, and cleanup costs alone to France, Great Britain, and the States of Guernsey were more than \$16,000,000. In a

limitation proceeding under 46 U.S.C. § 183, owners of the *Torrey Canyon* limited their liability to \$50, the value of one remaining life boat.

(2)

Had the Federal Act controlled the *Torrey Canyon* disaster, claimants would still have found themselves more than \$10 million short. That Act limits liability to \$100 per gross ton or \$14,000,000 *whichever is lesser*. Had the stranding occurred in the contiguous zone, the discharge of oil would probably not have constituted a violation under the Act in any case. Had the Florida Act controlled, not only would cleanup costs have been compensable, but owners of the *Torrey Canyon* would have been exposed to claims from private-owner damages to shore-front property as well. At 118,000 deadweight tons, the *Torrey Canyon* is less than half the size of super-tankers afloat today and dwarfed by 500,000 to 800,000 ton giants on the drawing boards. The Florida Act reflects natural concern for this State's vulnerable coastline. Damages to the ecology from a massive oil-spill are incapable of final measurement for a long period of time following the event, but adverse effects may be predicted with reasonable accuracy based upon previous spills. Aside from destroying the food chain and immediately killing fish and seabirds, there are more dramatic effects. For example, when the tanker *P.W. Thirtle* grounded off Newport, Rhode Island, 31,000 gallons of crude oil were discharged in an effort to refloat her. This is said to have resulted in virtual destruction of the entire oyster fishing industry of Narragansett Bay.

Concern for ecology and economy of the State reached a peak in mid-February, 1970, when the tanker *Delian Apollon* ran aground, spilling 21,000 gallons of Bunker 'C' oil into Tampa Bay. It formed a slick estimated to be 100 square miles in size, and cost nearly \$1.5 million to clean up, the amount of settlement in a suit filed by the State of Florida. Against this background, aware of limitations in the Federal Act, the Florida legislature passed the State Act. It takes up where the Federal Act leaves off.

B. The District Court found that the Florida Act violated Article III, Section 2, United States Constitution, in that unlimited and absolute liability of the Act conflicted with (a) general maritime law, and (b) provisions of the Federal Act. But the thrust of the Florida Act is to provide a remedy for non-maritime interests who are damaged *on land* by an occurrence within territorial waters; i.e. a beach-front resort and peripheral businesses dependent upon tourism attracted to Florida by clean air, beaches, and climate. It is also designed to protect aquafarming projects and commercial fishing enterprise within the State's territorial waters. Is there any limitation to interests protected by the Florida Act? Should an arbitrary limitation be imposed, measured by the value of the vessel after it went down? Why should all public and private interests of the State who are adversely affected by a massive oil-spill be subject to frustrations of the Limitation of Liability Act? E.g. *In re Barracuda Tanker Corp.*, 281 F.Supp. 228 (S.D.N.Y. 1968) modified, 409 F.2d 1013.

The Florida Act subjects shippers to absolute and unlimited liability for damage resulting from a spill, and requires them to demonstrate evidence of financial responsibility in an amount satisfactory to the State Department of Natural Resources before calling at Florida ports. Maritime interests, claiming that inability to purchase insurance for an unlimited amount precluded their doing business in the State, filed suit contesting validity of the Act. They admitted that they had made no attempt to comply with the Act. A State employee testified during the TRO hearing, that 28 maritime companies had shown satisfactory financial responsibility, clearing 669 ships for traffic to and from Florida ports. It is conceded that maritime interests prefer to sail fully insured against all contingencies, and that unlimited liability precludes insurance alone as a means of showing financial responsibility, but this should not sustain an argument going to constitutionality of the Florida Act.

In hearings before the congressional committees considering the Federal Act, maritime interests attacked absolute liability as being inequitable in view of the fact that marine disasters were often unavoidable, i.e., striking a mine, or being caught

in a hurricane. Ships in innocent passage, goes the argument should not be deemed responsible for results of an accident caused by an unforeseen force. But this argument overlooks the fact that in most instances, ship and cargo are heavily insured, and that the ship would not be in hurricane latitudes in the first place were it not for profits derived from the voyage to (a) the owner of the bottom whose mortgage is being paid by the time-charter, (b) the charterer, whose leased tanker-fleet may have been on a course chartered by (c) an operator, a subsidiary of (d) the cargo-owner, a major petroleum company. Profit is behind all of the motives that got the vessel into the storm in the first place, and that profit-margin takes into account loss by unavoidable accident. It is the non-maritime property-owner ashore who is truly the innocent party. Why should he or the public fisc assume liability for any or all of the maritime parties noted above? The argument also ignores modern concepts of tort law, that liability should fall upon the party in the best position to bear the loss or distribute the risk. In this context that party is the vessel or cargo owner or both agencies together, since they profit from the carriage contract, appreciate the full risks involved, and are in the best position to insure against them.

C. (1) The Florida Act is a valid expression of the state's police power. If the State cannot protect its citizens and property from ravages of oil-spill pollution caused by ships calling at its ports, then it has failed to meet an essential responsibility of government. Without unlimited and absolute liability, such protection is not afforded.

Maritime interests argue that since they may lawfully store, use, and transfer pollutants in the course of their lawful business, they should be liable only for negligence in its operation. If they can demonstrate no negligence, they should suffer no liability. To this, the citizen responds: 'I also own my property and have a lawful right to enjoy it and a clean environment. I did nothing to cause the spill of pollutants into state waters. You are blameless of negligence. Yet the waters are polluted, the air is fouled, our beaches smeared, and my business is ruined as the result of a discharge from operation of your agency, albeit careful and cautious and

prudent. Why should I be denied redress even though I have done nothing to bring about this discharge?' (Paraphrased from *St. Louis & San Francisco R. Co. v. Mathews*, 165 U.S. 1 (1896), a case involving sparks from passing locomotives rather than oil from passing vessels, but analogous to the equitable argument in the case at bar.)

The Florida Act makes those who traffic in pollutants responsible for damage to property and the environment which those pollutants cause upon discharge into state waters. To deny the State's competency to do this is to assert that the ultimate burden for oil-spill pollution is properly that of the private citizen or the public treasury rather than those whose instrumentality caused the discharge. The police power of the State is peculiarly appropriate to the object sought by the Florida Act.

Berman v. Parker, 348 U.S. 26 (1954) describes the breadth of the police power. *Huron Portland Cement C. v. City of Detroit*, 362 U.S. 440 (1960) approves its application in a maritime commerce context. Mechanics of the Florida Act are necessary to its enforcement, i.e., provisions for maintaining financial responsibility; requiring certain containment gear; requiring minimum sea conditions for entry and unloading; provisions for boarding and inspection. This Court has sanctioned such mechanics in one form or another in a line of cases beginning with *Cooley v. Board of Port Wardens*, 53 U.S. (12 How.) 299 (1851). The District Court's failure to recognize the Florida Act as a legitimate exercise of the State's police power led it to err.

(2)

Powers to provide protection described in the Florida Act were reserved to the states in the Tenth Amendment. The Tenth Amendment contemplates a conflict of power between the state and Federal domains. But, the District Court's treatment of *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917) and *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920), tends to establish admiralty as a third, autonomous sovereignty, impervious to influences of either state or

national governments. This case should not add to the legend. Article III, Section 2 is, on its face, simply a delegation of judicial power over cases of admiralty and maritime jurisdiction. It has now been so broadened as to authorize congressional action extending substantive maritime law far beyond its original limits.

The Florida Act speaks to sea-to-shore and, hence, non-maritime, torts. Oil-spill damages described in the State Act are consummated on land. Hence, admiralty jurisdiction would not have arisen at all, *The Plymouth*, 70 U.S. (3 Wall.) 20 (1865); *Ex parte Phenix Ins. Co.* 118 U.S. 610 (1886); *The Thomas Jefferson*, 23 U.S. (10 Wheat.) 428 (1825), had it not been for the Admiralty Extension Act of 1948, 62 Stat. 496, 46 U.S.C. § 740. But, see *Richardson v. Harmon*, 222 U.S. 96 (1911), an anomaly.

D. (1) But in extending admiralty jurisdiction to land, Congress over-stepped the constitutional grant of Article III, Section 2. That provision has been judicially determined to speak to torts only if they occurred on navigable water. *The Genesee Chief*, 53 U.S. (12 How.) 443 (1851). Since congressional authority for extending maritime jurisdiction relies exclusively upon the Admiralty Clause, *The Genesee Chief*; *The Eagle*, 75 U.S. (8 Wall.) 15 (1868); *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828), and congressional power can only be as extensive as Article III, Section 2, then the Court becomes the surveyor determining how far that power may extend. Congress cannot extend it beyond this Court's interpretations of Article III, Section 2, without exercising a judicial function. In the case of torts, substantive federal jurisdiction is measured by locality; if the tort occurs on navigable water it is a maritime tort. *Victory Carriers, Inc. v. Law*, 404 U.S. , 30 L.Ed. 2d 383 (1971), reminds us that the locality test was settled law 50 years ago. *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469 (1922). In extending maritime tort jurisdiction over sea-to-shore torts beyond navigable waters, Congress has rendered admiralty law amphibious; locality means nothing. Congress has also construed the Admiralty Clause in a manner inconsistent with this Court, exercising a super-judicial function. *The Steamer*

St. Lawrence, 66 U.S. (1 Black) 523 (1861); *The Belfast*, 74 U.S. (7 Wall.) 624 (1868); *Crowell v. Benson*, 285 U.S. 22 (1931). The Admiralty Extension Act is invalid.

(2)

But, if the Admiralty Extension Act is not unconstitutional, states are still free to enact substantive law in matters maritime. The extension of admiralty jurisdiction to land was not exclusive. Legislative history clearly shows that the Act signified no intrusion into common law preserves of the Saving Clause. Admiralty is not exclusive within the maritime tort context. Cf. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). Strict principles of uniformity are not applicable here, *Just v. Chambers*, 312 U.S. 383 (1941), and the state may still act substantively in the field of maritime tort remedies. There is no authority for suggesting that the state has lost its concurrent jurisdiction over maritime torts. *The Hamilton*, 207 U.S. 398, (1907); *Taylor v. Carryl*, 61 U.S. (20 How.) 583 (1857).

(3)

The Constitution recognizes an individual's fundamental right to a healthful environment. This right, though not enumerated, was retained by the people in the Ninth Amendment. Certainly there is a guarantee to a healthy environment as fundamental as the penumbral right to privacy. E.g., *Griswold v. Connecticut*, 381 U.S. 79 (1965). In the Florida Act, this guarantee is secured against continuing assaults of oil pollution of the seas. People of Florida had a right to take up statutory arms in defense of their environment.

E. The Jensen Doctrine is inapplicable to an attack against the Florida Act. *Southern Pacific Co. v. Jensen* sets out a hide-bound principle of uniformity necessary only to certain matters maritime which the District Court mistaken applied outside the arena of *Jensen's* facts, *Standard Dredging Corp. v. Murphy*, 319 U.S. 306 (1942), despite language of the Jensen

Case itself which impliedly precludes its application into the common law area of torts. 244 U.S. at 218.

F. (1) Limitation of liability should not be applicable to a sea-to-shore tort, despite *Richardson v. Harmon*, 222 U.S. 96 (1911), which extended the Limitation of Liability Act, 46 U.S.C. §§ 181-189, to a non-maritime tort. If that case is of sufficient vitality to reach sea-to-shore tort actions arising out of an oil-spill, then it will frustrate (a) fair recovery of cleanup costs by other agencies than the Federal government, and (b) private property owners' recovery in common law actions. Reasons underlying codification of the concept of limited liability never contemplated severe damage to shore property inflicted by a massive oil-spill. Continued protection of maritime interests to the detriment of the state and its citizens is no longer justified in an era of sophisticated maritime insurance and super-tankers. It is apparent that limitation proceedings would not protect ship-owners from claims of the United States arising under the Federal Act. Why should limits imposed by 46 U.S.C. § 183 be resurrected to preclude a non-Federal claim?

(2)

History of limitation of liability further demonstrates its inappropriateness to an oil-spill context. Designed to protect ship-owners from claims of cargo-owners and passengers, it was never conceived to thwart just claims of persons not in privity with maritime commerce. Its application to *Torrey Canyon* cleanup claims, *In re Barracuda Tanker Corp.*, 281 F.Supp. 228 (S.D.N.Y. 1968) modified, 409 F.2d 1013 (2d Cir 1969), shows how inequitable its extension to this context would be. Moreover, its applicability to torts consummated on land is unconstitutional in that (a) it extends admiralty and maritime jurisdiction beyond the locality of navigable waters, and (b) has the effect of depriving damaged property owners of their property without substantive due process of law in violation of the Fifth Amendment to the United States Constitution. Limitation of liability is strictly a creature of an act of Congress. It is no less an arbitrary deprivation of

property than it would be if owners of the ship took control of the ruined beachfront under authority of a Federal statute. Cf. *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799 (1950). While the hotel-owner whose business is ruined has his day in court as a result of limitation proceedings, it is form without substance; that he will be denied full compensation for his loss is fore-ordained. To apply it in this context is a perversion of the remedy which the Limitation of Liability Act was designed to provide. This unconstitutional application of an ancient tenet of maritime law should not be affirmed as a legitimate frustration of the states' police power.

II

A. Just as maritime law should continue to develop in a reasonably consistent pattern, so should states take appropriate measures to assure protection of their citizens, economy, and ecology from massive oil-spills. Despite obvious conflict in this case, these ambitions are not mutually exclusive. That they clash at all is because the District Court interpreted the apparent conflict raised by the complaint in absolute terms of hornbook dogma, willing to uphold abstract tenets of "uniformity" to the detriment of the State and its citizens. The position of the State is, however, that the Florida Act should be judged not by its asserted conflict with narrow principles of maritime law, but by its response to the Federal Act.

(1)

Analysis of both Federal and State Acts indicates that, while they partially overlap in territorial application, the former is not restrictive of the other. Rather than competition in regulation of maritime commerce, the two Acts speak to *Federal-State cooperation* in meeting the threat of oil pollution of coastal waters. Although the Florida Act provides unlimited and absolute liability while the Federal Act provides certain defenses and limits liability, there is no antagonism between conflicting jurisdictions. Liability under the Federal

Act attaches only to cleanup costs incurred by governmental agencies. Under the State Act, liability is measured by the actual cleanup costs to the State *and* to damage claims by private citizens. The primary responsibility of the government the Federal Act is in coordinating response of State and Federal teams to a maritime disaster threatening pollution of coastal waters. In the National Contingency Plan, the Federal Act contemplates close cooperation between State and Federal agencies to combat a mutual nemesis. There is a strong implication in the Federal Act that court proceedings arising thereunder are not within the province of maritime law at all; i.e. express grant of jurisdiction to the Federal judiciary which would be unnecessary had Congress deemed the Federal Act to be a part of general maritime law, and, as noted, liability measured by tonnage up to \$14,000,000 with no reference to, or room for, limitation proceedings under 46 U.S.C. § 183.

Moreover, in 1161(o)(2), the Federal Act expressly disclaims preemption of States from providing "any requirement or liability with respect to the discharge of oil into any waters within such State." Surely this speaks to state substantive law. The District Court erred in finding that in that Section, Congress did not mean what it said because *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920) precludes such delegation of authority to state legislatures. To frustrate the clear expression of Federalism contained in the Federal Act on authority of *Knickerbocker Ice* is to overlook (a) the limited purposes for which that case was decided (based upon necessity for upholding the Jensen Doctrine, already shown to be inapplicable here), and (b) the strong dissent of Mr. Justice Brandeis, particularly appropriate to the instant controversy, in *Washington v. W.C. Dawson & Co.*, 264 U.S. 218 (1924).

(2)

A review of the historical development of Federalism in the United States describes reason for its emphasis in this case. To hold that states are precluded from exercising their Federalist responsibilities—so clearly contemplated in the Federal

Act—merely to extend the abstraction of “uniformity” beyond confines of the Jensen context, would be contrary to previously cited authority of this Court, inconsistent with the clear intent of Congress in the Federal Act, and a denial of the police power of the State.

(3)

The District Court noted that, as to arguments raised by Florida that the State Act filled gaps deliberately left by Congress in the Federal Act, the “gap” theory had been put to rest by *Moragne v. State Marine Lines, Inc.*, 398 U.S. 375 (1970), a case the State of Florida respectfully suggests is inappropriate to the instant controversy. In so doing, the District Court overlooked this Court’s opinions in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), and *Chevron Oil Co. v. Huson*, U.S. ,30 L.Ed. 2d 296, (1971). The “gap” theory is an integral part of Congress’ expression of Federalism in the Federal Act, and should be affirmed as such by reversal of the judgment of the District Court.

ARGUMENT

I.

The fact that judicial power of the United States is extended "to all Cases of admiralty and maritime jurisdiction" by Article III, Section 2 of the Constitution does not impose a permanent barrier in the path of State legislatures seeking to protect citizens, property, ecology, economy and general welfare from the deleterious effects of massive oilspill pollution of state waters.

A. Preliminary Statement

*"Pollution has been defined as '... any substance added to the marine environment as a result of man's activities which has a measurable and generally detrimental effect upon the environment.' Ketchum, Man's Resources in the Marine Environment, in Conference on Pollution and Marine Ecology 1, 3 (1967). The majority of oil pollution is caused by persistent oils, that is, crude oil, fuel oil, heavy diesel oil, and lubricating oil. These oils persist for months on the surface of the sea and are capable of being carried considerable distances by currents, winds, and surface drifts."*¹

Issues rising here are as subtle as they are varied. They reach across key provisions of the Constitution, to be discussed below, and involve decisions of this Court which track development of (a) maritime law, and (b) our federal system of state and national priorities. Ultimately, consideration of these issues leads to a bed-rock question of national and, perhaps, international consequence: the extent to which a state, in the exercise of its police power, may enact legislation to control, establish responsibility, and assess liability for oil-spill pollution of its territorial waters. The thrust of the District Court's order is that it cannot do so in any case; that in certain constitutional provisions states have irrevocably surrendered this power to the Federal domain; and that several statutes enacted under authority of these

¹ Comment, *Oil Pollution of the Sea*, 10 Harvard International Law Journal 316, (Spring 1969), fn. 1.

constitutional provisions preempt the field of (a) water quality control as it relates to oil-spill pollution, and (b) all matters maritime.

It is Florida's position that its Oil Spill Prevention and Pollution Control Act of 1970² (hereinafter the Florida or State Act) is not such an onerous intrusion into federal maritime law as the Court below found it to be. To the extent that friction between the state and the maritime province occurs, however, Florida's position is firmly fixed upon the high-ground fact that it has not only a right but a duty to protect the health and welfare of its citizens, and that, in a collision between this duty and prerogatives claimed under maritime law, it is the latter that must give way to the former.

This, of course, presumes that the State Act is a valid exercise of the police power. Florida contends that it is unless Congress has preempted the field in the Water Quality Improvement Act of 1970³ (hereinafter the Federal Act). The District Court held that the Federal Act does in fact preempt the field. But Congress, and the State of Florida, disagree.⁴

Any exercise of the police power implies a certain urgency. It is helpful to view the Florida Act from the perspective of urgency that prompted its passage.

Dominant state interests are at stake here: conservation of water as a natural resource, the right of its citizens to an unpolluted environment, and the right of its citizens to the full use and enjoyment of their property. The Legislature of the State of Florida determined that these rights and resources were fundamental and compelling, and were endangered by continued assaults of marine pollution. The

²Ch. 70-244, Laws of Florida, 1970; Chapter 376, Florida Statutes.

³Pub.L. 91-244, 91st Congress, 2d Session (Apr. 3, 1970), 84 Stat. 91; 33 U.S.C. § 1161 *et seq.*

⁴33 U.S.C. § 1161 (o)(2).

State Act was designed to protect these interests. It was conceived as an expression of the State's police power, "being necessary for the general welfare, the public health, and the public safety of the state and its inhabitants . . ."⁵ It was also conceived as an expression of federalism, a willingness to enter into a joint venture with the national government for the abatement and control of oil-spill pollution, an enterprise shaped by Congress in the Federal Act, (which only provides for *Federal* action, for damages assessable for *Federal* costs, for massive *Federal-State* cooperation, and which specifically disavows preemption).

To conclude, as the District Court did, that a state cannot legislate in this area because the power of Congress to regulate maritime commerce is exclusive, is to rely heavily upon a non-sequitur. It is true that Congress alone may regulate maritime commerce. But it does not follow from this that the state is forbidden to exercise its police power to protect fundamental and compelling state interests. These points will be discussed below.

Through all of the flurry of legal argument invoking traditional concepts of Federal maritime policy, the Court is respectfully requested to measure the State Act by the end sought to be achieved: the right of a state to protect its property and that of its citizens. The property sought to be protected is, at least in one sense, necessary to life itself.

(1.)

The subject is water and the need to
conserve it.

The possibilities of losing our water supply by depletion or pollution evoke fears almost as old as western civilization. To destroy sweet water is to threaten life. The effects of such a loss are so awesome that the power to accomplish it was ascribed early in our experience only to the deity who apportioned the power among a select few. So Moses threatened Pharaoh:

⁵Ch. 70-244, Laws of Florida, 1970, § 21.

"Behold, I will smite with the rod that is in my hand upon the waters which are in the river, and they shall be turned. And the fish that are in the river shall die, and the river shall become foul . . ." Exodus 7:17-18.

But, 4000 years later, the "select few" have multiplied several million-fold, and today foul rivers and dead fish are commonplace. To appreciate the magnitude of the problem, it is necessary to understand the extent of our need for water.

In 1963, experts estimated that the maximum amount of fresh water available for all uses in the United States was approximately 650 billion gallons per day.⁶ It was estimated that the total fresh water usage eight years ago was 360 billion gallons per day.⁷ The projection for the year 2000 was 1000 billion gallons per day.⁸ Since this is 350 billion gallons more than we have available, if the experts are within a 30% margin of error, we can better understand Pharoah's predicament.

Two feasible solutions have been suggested. One is to refine the process for making sea water potable,⁹ and the other is to re-use our present water several times; to re-cycle water as we do aluminum, glass, and paper.¹⁰ But in any case, it is necessary to safeguard the quality of even that water we intend to re-use. As Professor Hines observed in Part I of his Iowa Law Review trilogy on this general problem, 52 Iowa L. Rev. at p. 188:

Re-use of water requires that certain water quality levels be maintained, however, and here is where water pollution is a

⁶Report of the Staff of the Senate Committee on Public Works, 88th Cong., 1st Sess., A Study of Pollution—Water 3 (Comm. Print 1963), cited in Hines, *Nor Any Drop to Drink: Public Regulation of Water Quality Part I: State Pollution Control Programs*, 52 Iowa L. Rev. 186 at 187, fn 2.

⁷Hines, p. 188, fn 3.

⁸*Id.*

⁹Carr, *DEATH OF THE SWEET WATERS*, 211-213 (1966).

¹⁰See, Bryan, *Water Supply and Pollution Control Aspects of Urbanization*, 30 Law & Contemp. Prob. 174 (1965).

critical obstacle to the assurance of adequate water supplies for the foreseeable future. * * *

Two conclusions are reached from Professor Hines' trilogy and from a review of commentators he cites.¹¹ First, the water crisis will worsen, not abate, without strenuous efforts to conserve our present supply. Second, even with such strenuous efforts, developments in processes for re-cycling and for desalination are necessary if we are to survive as a civilization.

The public had only just awakened to the urgent necessity for conserving water resources when Moses smote the waters with his rod. In late March, 1967, the 60,000 gross ton oil tanker *Torrey Canyon* ran aground on Seven Stones Reef off the coast of Cornwall, England. The ship split open and discharged most of its crude oil cargo into the English Channel. Worldwide attention was focused on the efforts of two nations, Britain and France, to combat the massive slick. A multitude of procedures were employed, without success. Property damage particularly along the French coast was enormous. The damage to marine and animal life will never be accurately gauged. The R.A.F. finally bombed the wreck to destroy it, and the British exchequer alone was £1,600,000 lighter.¹²

The *Torrey Canyon* was American owned and Liberian registered. Therefore, the Board of Investigation of Liberia held an official inquiry April 3-5, 1967, to determine the cause of the stranding of the vessel. The Board found the sole cause to have been negligence of the captain. It recommended that his license be revoked.¹³

¹¹F. Graham, *DISASTER BY DEFAULT: POLITICS AND WATER POLLUTION* (1966); Wright, *THE COMING WATER FAMINE* (1966); Rodale, *OUR POISONED EARTH AND SKY* (1964); Carson, *THE SILENT SPRING* (1962); Stein, *Problems and Progress in Water Pollution* 2 *Natural Resources J.* 388 (1962).

¹²See, Comments, *Oil Pollution of the Sea*, 10 *Harv. Inter. L. J.* 316 (1969), hereinafter cited as "Comments."

¹³Comments, p. 331, fn 69.

The owners of the *Torrey Canyon*, as authorized by the Limited Liability Act of 1851, Ch. 43, § 3; 9 Stat. 635, 46 U.S.C. § 183 (1964), were permitted to file a petition to limit their liability to \$50, the value of one surviving lifeboat.¹⁴ This order was subsequently modified, 409 F. 2d 1013 (2d Cir. 1969), but only by virtue of ingenious legal tactics by attorneys for the governments of Great Britain, France, and the States of Guernsey to avoid absurd limitations of maritime law.¹⁵

(2.)

The subject is also preservation of other resources and the state's right and duty to protect them from oil pollution.

The problem with a massive oil slick is that its ultimate effects are not always ascertainable before legal action must be taken, and even when they are, there's not very much that victims can do to obtain compensable damages for their loss.

More than 880,000 barrels of oil were aboard the *Torrey Canyon*, and more than half of it was estimated to have been released into the sea.¹⁶ Britain figured its cost of clean-up at \$8,156,400. France sought an additional \$8 million for removing oil from its coasts. To off-set these clean-up costs, the tanker's owners settled out of court with the British and French governments for \$7.2 million.¹⁷ Assuming that the Federal Act had been in effect and had controlled the outcome of liability arising out of the *Torrey Canyon* episode, claimants would have received 1.2 million dollars less! At \$100 per gross ton, a 60,000 gross ton tanker has a liability limit of \$6 million. Even though the clean-up costs exceeded \$16 million, the \$14,000,000 ceiling in the Federal Act would never have been reached. See Notes, *Liability for Oil Pollution*

¹⁴In re Barracuda Tanker Corp., 281 F. Supp. 228 (S.D.N.Y. 1968).

¹⁵For the legal landscape prior to 1948, See Nanda, *The Torrey Canyon Disaster: Some Legal Aspects*, 44 Denver L. J.

¹⁶Comment, *Post Torrey Canyon: Toward a New Solution for the Problem of Traumatic Oil Spillage*, 2 Conn. L. Rev. 632 (1970).

¹⁷E. Cowan, *OIL AND WATER: THE TORREY CANYON DISASTER* (1968).

Cleanup and the Water Quality Improvement Act of 1970, 55 Cornell Law Review 973 (1970), where at fn 78, p. 982, is the following comment relative to the \$100 per gross ton limitation in the Federal Act:

"Using the Torrey Canyon figures (59,000 tons of oil cleaned up at a cost of \$16 million), it costs about \$270 to clean up one ton of oil. Since the ratio of deadweight tonnage (cargo capacity) to gross tonnage on the Torrey Canyon was about two to one... the cleanup costs were approximately \$540 per gross ton.

"The \$100 per gross ton limit is inadequate even if one assumes, as did the American Petroleum Institute (1969 Hearings, pt. 4, 1318), the cost of cleanup following the Torrey Canyon wreck to be \$7.2 million. Using that figure, the costs come to \$244 per gross ton.

"A study conducted by the Federal Water Pollution Control Administration also indicates the insufficiency of the \$100 per gross ton figure. It was found that cleanup costs range from under \$1.00 to over \$5.00 per gallon of oil. There may be from 240 to 300 gallons of oil in one ton, depending upon specific gravity and temperature. Finally, the ratio of carrying capacity to gross tonnage varies from 2.7:1 to 1.5:1. Using figures of \$1.00 per gallon, 250 gallons per ton, and a ratio of 1.8:1, cleanup cost was calculated to be \$450 per gross ton.

"Although gross tonnage has traditionally been used to calculate liability, it is more meaningful to speak in terms of dead weight tonnage. The latter is the cargo carrying capacity of the vessel, and the ratio between the two varies from vessel to vessel. Thus, although a liability figure based on gross tonnage would accurately reflect cleanup costs of the oil carried on one vessel, it might be very inaccurate when applied to another vessel. The amount of oil, not the vessel's gross tonnage, determines the cleanup costs. * * *"

If one estimates cleanup costs to be \$270 per ton on an average, the \$14 million ceiling on negligence liability under the Federal Act will limit recovery to spills somewhat under

the *Torrey Canyon* class; it has been estimated by the same commentator quoted above that this limitation will pay costs of cleanup of only 51,851 tons of oil.¹⁸

The *Torrey Canyon*, of course, at 118,000 dead weight tons, was not the largest tanker afloat by any means. The tankers *E. Maersk* (100,600 dwt), *Bergebig* (149,500 dwt), *Esso Scotia* (250,000 dwt), *Universe Island* and *Universe Kuwait* (each at 312,000 dwt) are already in use.¹⁹ But even these larger vessels are not enough. The increase in shipment of oil by sea demands bigger bottoms. As is noted at 10 *Harvard International Law Journal* at page 317:

" * * * (B)etween 1938 and 1967 world production of oil increased nearly seven times, from 278 million tons per year to 1,828 million tons. In 1967, it was estimated that more than 700 million tons of this annual production were being transported by sea.

"Not only is more oil being moved by sea each year, but the size of oil tankers has also increased. The average tanker used during World War II had a capacity of 16,000 tons, but by 1965 that average had risen to 27,000 tons, and new tankers delivered in 1966 average about 76,000 tons. A Japanese company has launched a 276,000 ton tanker, and other Japanese yards have orders for tankers as large as 312,000 tons. More than sixty tankers of 150,000 tons or more are on order throughout the world, tankers of 500,000 to 800,000 tons are on the drawing boards, and those of more than one million tons are thought to be feasible. On the new 1,010 foot British tanker "*Esso Mercia*" two officers have been issued bicycles to help patrol the decks of the 166,890 ton vessel.

"The size of the tanker fleet itself is growing at a rate that rivals the growth in average size of new tankers. In 1955 the world tanker fleet numbered about 2,500 vessels. By 1965 it had increased to 3,500, and in 1968 it

¹⁸ 55 *Cornell Law Review* 973 at 982, fn 79.

¹⁹ 55 *Cornell Law Review* 973 at p. 983, fn. 80.

numbered some 4,300 ships. At the present time nearly one ship out of every five in the world merchant fleet is engaged in transporting oil, and nearly the entire fleet is powered by oil.

If the present limitations upon liability of ship owners are to continue, limiting the owners' liability to the value of the vessel *after* the accident, and assuming no problems vis-à-vis knowledge or privity on the part of the owners, it is not at all inconceivable that an 800,000 dwt. ton super-tanker could dump more than 3/4 of a million tons of crude oil between the coast of Florida and the Gulf Stream, break up and sink, and leave the owners completely free of liability for damages to the environment, to private property, and to businesses depending upon tourism.²⁰ Assuming that the Federal Act were applicable, at a cleanup cost of \$270 per ton, the owners liability would be limited to damage caused by less than 52,000 tons out of the 750,000 tons spilled.

But even this is not certain under the Federal Act. For under 33 U.S.C. § 1161 (b)(2) it is not a violation to discharge oil into or upon waters of the contiguous zone where such discharge is permitted by article IV of the International Convention for the Prevention of Pollution of the Sea by Oil, 1954, as amended.²¹ Excepted discharges under the Convention include those to save life at sea, discharges resulting from damage to a ship, and jettison discharges to safety of ship and cargo. Patently, catastrophic oil-spills of the *Torrey Canyon* category occur for reason of collision or stranding. It is difficult to imagine either without "damage to the ship". Thus, assuming Seven Stones Reef to have been between three and 12 miles off-shore, the Federal Act, had it governed recovery, would have availed the government nothing.

²⁰Sec. Shutler, *Pollution of the Sea By Oil*, 7 Houston L. Rev. 415 at p. 438 (1970).

²¹1954 London International Convention for the Prevention of Pollution of the Sea by Oil, as amended Apr. 11, 1962, annex A, (1966) 17 U.S.T. 1523, T.I.A.S. No. 6109, 600 U.N.T.S. 332.

Damages to business and to private property in such a hypothetical catastrophe are almost limitless. It is not difficult to understand the effect this would have on tourism and the state's economy, nor the rage and frustration of private citizens whose right to enjoy the environment or, indeed, their homes would be thereby diminished or destroyed.

But what of the damages to the ecology? To what extent is such a tragedy an overdraft upon the bank in which is stored this generation's apportioned amount of our natural resources?

"Some damage to marine life is obvious in the wake of a disaster such as the one which befell the 'Torrey Canyon'. Surface feeding fishes die when they swim into floating oil, and even slight, non-fatal contact may render the fish inedible. Shellfish, among others, are also vulnerable to oil pollution. When the tanker 'P.W. Thirtle' grounded off Newport, Rhode Island, 31,000 gallons of heavy, black oil were discharged from her tanks in an effort to refloat the ship; the result of this was the virtual destruction of the entire oyster fishery of Narragansett Bay. The most serious consequences of oil pollution, however, may not be those which are immediately obvious. According to Dr. Erwin S. Iversen, a marine biologist:

The greatest problem may be the toxic effects on the intertidal animals that serve as food for the other more important fishes... I don't think the effect is merely that of killing large populations of commercial fishes. Worse than that, it interrupts the so-called food chain.

"There have been few specific studies of the effect that oil accumulation has on this food chain. One study, conducted by Dr. Paul Caltsoff of the United States Fish and Wildlife Service, found that the diatoms on which oysters feed will not grow where there is even a slight trace of oil on the water. The effect of oil on such microscopic marine plant life may be of great importance, because it is estimated that it takes as much as ten pounds of plant matter to produce one pound of fish.

"Large scale oil pollution, such as that which occurred when the "Torrey Canyon" ran into Seven Stones Reef, results in huge lossess of water birds. Aside from humane and aesthetic considerations, these birds play a vital role in the ecology of the seashore, a role which profoundly affects the fishing industry. The uncertainty as to the actual extent of the damage done to marine life by oil pollution makes it difficult to estimate the economic effect of such damage, but the importance of the fishing industry within the world's economy is not in doubt and is steadily increasing. Between 1958 and 1963, for example, there was a 42% rise in the world catch. Because of the increasing importance of seafood protein, future damages to marine life will have progressively greater economic consequences.²²

All legislation is prospective, and it is necessary in preparing legislation to think in terms of hypotheticals. But it is not improbable that Florida would suffer a catastrophic oil-spill of the dimensions theorized above. Far from it. The "it-can't happen-here" assurances should have been drowned in the estimated 21,000 gallons of Bunker "C" oil²³ that flowed from the ruptured hull of the tanker *Delian Apollon* which ran aground just south of Gandy Bridge in Tampa Bay on February 13, 1970. The oil slick several days later covered 100 square miles of Tampa Bay,²⁴ and cost Humble Oil & Refining Company approximately \$1.4 million to clean up, a settlement out of court of the suit brought by the State of Florida.²⁵

It is against this background that the Florida legislature convened in 1970, and passed the State Act. The legislature was aware of the frustrations and trials met by the Senate Committee attempting to shape realistic and responsible

²²10 Harvard International Law J. 316 at p. 321 (1970).

²³*St. Petersburg Independent*, February 18, 1970, p. 1.

²⁴*Tampa Tribune*, February 16, 1970, p. 1.

²⁵*Earl Faircloth v. Motor Tanker Delian Apollon*, USDC, M.D., Tampa Division, No. 70-47-Civ-T, February 16, 1971.

legislation on the Federal level.²⁶ The legislature was also aware that the Federal Act, which became law during the first week of the 1970 session, expressly sanctioned the right of the states to enact legislation in the field of marine oil-spill pollution. Moreover, Florida lawmakers were acquainted with shortcomings in the Federal Act, such as the limitation of negligence liability, and its limited effectiveness to oil pollution only. The State Act attempts to fill gaps in the Federal Act; it takes up where the Federal Act leaves off.

B. The District Court's Error

*"Oil is oil and whether useable or not by industrial standards it has the same deleterious effect on waterways. In either case, its presence in our rivers and harbors is both a menace to navigation and a pollutant."*²⁷

*"Pollution by oil is no longer accepted as a necessary, if unfortunate, by-product of oil use in furnishing the energy needs of the United States. Damage from oil pollution has become a major part of the public concern with the deterioration of our environment."*²⁸

*"One of the most effective ways to control oil discharge would be to force the oil companies to bear all the risks attendant to oil shipping. If this were possible, many of the problems involved in oil transport by sea would be greatly diminished since oil companies and their insurers would have financial incentive to take every precaution against potential damage."*²⁹

²⁶ Problems faced by the Congress in attempting to reach a reasonable result in the Federal Act are well documented in Mendelsohn, *Maritime Liability for Oil Pollution—Domestic and International Law*, 38 George Washington L. Rev. 1 (1969).

²⁷ Mr. Justice Douglas in *United States v. Standard Oil Co.*, 384 U.S. 224 at 226 (1966).

²⁸ *Legal, Economic, and Technical Aspects of Liability and Financial Responsibility as Related to Oil Pollution*, A Study by the Program of Policy Studies in Science and Technology, George Washington University, For the United States Coast Guard, (December 1970) at page i.

²⁹ Baldwin, *Public Policy on Oil—An Ecological Perspective*, 1 Ecology Law Quarterly 245, 271 (Spring 1971).

Absolute liability without fault is the *sine qua non* of protection against oil-spills and the cornerstone of objections to the Florida Act.

(1.)

"That the Florida Act constituted unlawful intrusion into the exclusive federal admiralty domain is apparent when one observes the extent to which that act would change substantive maritime law. The most obvious changes would be in the liability now imposed by W.Q.I.A. and maritime rules on shippers and the operators of onshore and offshore facilities. . . . Under the Florida Act . . . liability without fault is the foundation for 'damage incurred by the state and for damage resulting from injury to others,' just as it is in the case of cleanup costs. By substituting absolute liability for proof of negligence or unseaworthiness as a condition to unlimited recovery, the Florida Act, if valid, would materially change the substantive maritime law governing the disposition of claims arising from the pollution of coastal waters." *The American Waterways Operators, Inc. v. Reubin O'D. Askew, et.al.*, 335 F. Supp. 1241 (M.D. Fla. 1971), (A 42-43)

The Florida Act deals with sea-to-shore torts. Its principle thrust is toward their prevention and control. It is concerned not for welfare of shipping interests, but for welfare of its citizens. It is designed not to protect traditional concepts of maritime law, but the property of persons having no connection with the admiralty. Interests protected by the State Act are not *in privity* with maritime commerce through contracts, employment, freight, cargo, industry or profits.

This is not to say that Florida has no citizens, corporate or private, engaged in or dependent upon shipping. It is, rather, to admit the obvious: that such business interests are incidental to the dominant state interests protected by the the legislation whose judicially imposed demise is appealed here.

The Florida Act imposes unlimited liability without fault upon virtually any vessel which discharges oil or any other pollutants while destined for or leaving any Florida port. § 376.12, Florida Statutes; (A 68); § 376.031(7), Florida Statutes, (A 58). It does so to complete the protection of interests described. Anything short of unlimited liability without fault is less than complete protection. This premise, upon which the Florida Act is based, is strenuously resisted by maritime interests. The intensity of their resistance attests to validity of the premise.

The Florida Act does not deal with minor spills and discharges. These occur daily in state waters. Damage recovery from such spills to state waters, the ecology, and shoreline cleanup is provided under a companion statute.³⁰ Damage incurred by private property owners, relatively minor, is remedial in common-law courts. It is doubtful that such would be frustrated by limitation proceedings under 46 U.S.C. § 183 (1964).

Although damages from minor spills are recoverable under the State Act *sub judice*, the Act's focus is not so limited. The State of Florida does not appeal here from loss of duplicate remedies. The State's concern is more urgent. It goes to the heart of the statutory scheme described above.

The Florida Act is addressed to effects of a maritime disaster of *Torrey Canyon* proportions.³¹ Without unlimited and absolute liability imposed by statute against owners or charterers of the offending tanker, no remedy exists for state

³⁰Chapter 403, Florida Statutes, Part I, The Florida Air and Water Pollution Control Act of 1967, as amended; Part II, Interstate Environmental Control Compact of 1971.

³¹For descriptions of this occurrence and insight into its appropriateness in the instant context, see Mendelsohn, *Maritime Liability for Oil Pollution—Domestic and International Law*, 38 George Washington L. Rev. 1 (Oct. 1969); Comment, *Oil Pollution of the Sea*, 10 Harv. Inter. L.J. 316 (1969); Nanda, *The Torrey Canyon Disaster: Some Legal Aspects*, 44 Denver L.J. 400 (1967); E. Cowan, OIL AND WATER, THE TORREY CANYON DISASTER (1968).

or private property owners damaged by a massive oil slick.³² Under Federal maritime law as conceived by the District Court in this case, owners and charterers would find safe harbor in admiralty defenses and limitations, while Florida beaches, marinas, and waterways were smeared with 440,000 barrels of crude oil. Assuming that such an occurrence cost the State of Florida no more than it cost the governments of Great Britain, France, and the Guernsey Isles to cleanup approximately the same size slick, the 'bottom line' would still amount to far more than merely \$16,000,000. Aside from the adverse ecological effects, what would it cost private hotel owners who depend upon a pollution-free environment to meet mortgage payments? What would it cost peripheral businesses such as airlines, buses, taxi and rental car companies? What would it mean to restaurant and night-club business in the area affected? How much would it lessen employment? Florida leases territorial sea-beds for aquaculture projects on the premise that man will one day live off of food from the sea as he does now from conventional farms.³³ If 31,000 gallons of oil discharged off the coast of Rhode Island by the grounded tanker *P.W. Thirtle* could virtually destroy the entire oyster fishing industry on Narragansett Bay, what would a 440,000 barrel slick do to aquafarming or Florida's commercial fishing industry, or the commercial oyster beds in Apalachicola Bay? Why should all of the interests, public and private, adversely affected by a massive oil-spill be subject to frustrations of the Limitation of Liability Act, 46 U.S.C. § 183?³⁴ The practical effect in this context of limitation

³² Approximately half of the *Torrey Canyon's* 880,000 barrels of crude oil are estimated to have spilled into the English Channel to form the largest oil slick in history. Comment, *Post Torrey Canyon: Toward a New Solution to the Problem of Traumatic Oil Spillage*, 2 Conn.L.Rev. 632 (1970); Note, *Liability for Oil Pollution Cleanup and the Water Quality Improvement Act of 1970*, 55 Cornell L. Rev. 973, 982 (1970). Compare this with the 100-square mile slick formed in Tampa Bay by *Delian Apollon* when only 21,000 gallons of oil escaped. Cleanup costs for *Torrey Canyon* slick were in excess of \$16 million; for the *Delian Apollon* a mere \$1.4 million.

³³ 253.67 - 253.75, Florida Statutes.

³⁴ See how it worked with *Torrey Canyon: In re Barracuda Tanker*, 281 F.Supp. 228 (S.D.N.Y. 1968), modified 409 F.2d 1013 (2d Cir. 1969).

proceedings is to deny those damaged any remedy for wrong done them. That is the result of application of maritime law. And that is the reason for unlimited and absolute liability in the Florida Act.

The State Act subjects owners of vessels and terminal facilities to two principal conditions:

First, under § 376.12 anyone who "permits or suffers" a polluting discharge is absolutely liable (a) to the state "for costs of cleanup or other damage" and (b) for damages resulting from injury to others. (A70) The state must prove only the fact of the occurrence of the polluting discharge. It need not plead or prove negligence. The fact that liability is unlimited makes it no different from any other form of tort liability, including the liability for negligent pollution damages which existed prior to this statute. It is the absolute character of the liability that is unusual.

Second, § 376.14 requires owners or operators of terminal facilities or vessels to maintain with the Department of Natural Resources "evidence of financial responsibility based on the capacity of the terminal facility or tonnage of the ship, the cargo carried, and other similar factors to which the vessel could be subjected * * * " (A70)

It is important for purposes of analysis to keep in mind the distinction between the *absolute liability* provision and the *financial responsibility* requirement. This distinction is underscored by the history of response to the statute. The statute became effective July 1, 1970. However, the requirement of filing under the financial responsibility provision was postponed to March 15, 1971. Maritime interests took no action to oppose the law until shortly before the financial responsibility filing date; that, and not the passage of the law, triggered the opposition.

In the District Court, maritime interests made no attempt to differentiate between the issues of absolute liability and financial responsibility. Rather, they maintained generally that they could not comply with the law without ruinous

consequences, using their arguments on each issue to buttress the other. (See paragraphs 25-29, Complaint, A 10-12)

As to absolute liability, maritime interests maintain that they could not continue to do business while exposed to *unlimited* liability under the Act. They pointed out that they could not insure against such liability.

The unlimited liability to which maritime interests were subjected is no ground for reasonable objection. Under common law they were subject to unlimited liability for any kind of tortious action, just as an individual motorist is subject to unlimited liability for negligence. Limitation proceedings under 46 U.S.C. § 183, although theoretically available, would not always be desirable. The strict liability provision of the Act of course gives them greater exposure, but businessmen are able to operate subject to strict liability in other commercial areas.

Although the State Statute purports to eliminate negligence as an element of liability, the person made liable under § 376.12 is one "who permits or suffers" a polluting condition. (A 68) This language clearly indicates that the fact of pollution is not enough; some element of responsibility must be established as a requisite to recovery.

Moreover, § 376.11(6) provides that the Department of Natural Resources shall recover for the "coastal protection fund" established under this section "from the person or persons *causing* the discharge jointly and severally all sums expended therefrom . . ." (Emphasis supplied; A 67) Again, wording of the statute reiterates the requirement of establishing responsibility as a necessary condition to recovery.

It is in the insurance aspect that the maritime interests make their most effective argument, but they do so by confusing the strict liability and financial responsibility requirements. As discussed more fully below, *rules promulgated* under the State Act (as opposed to language of the Act itself) require that an insurance policy sufficient to meet financial responsibility requirements must have no limits on the

amount of coverage. (A 73) No insurance company would prudently issue such a policy.

However, there would seem to be no valid reason why maritime interests could not obtain insurance having a *specific limit* of liability. Such a policy, although it would not meet the financial responsibility requirement of the present rules, would offer protection to the insured. Protection afforded by such a policy would be tantamount to the protection enjoyed by a motorist who has a liability policy of stated limits and who must bear the exposure of liability above the policy limits.

Maritime interests, however, ignored this possibility, and emphasized that the financial responsibility *rule* requires an unlimited policy which cannot be obtained, and by this confusion made an appealing argument that they could not insure against the liability imposed by the Act.³⁵

Insurance companies have apparently indicated other objections to providing coverage under the Act, such as the provision which allows direct suit against the insurer.³⁶ However, only the requirement in the Regulations (A 73-74) of insurance against unlimited liability appears to support objections against providing coverage.

Financial responsibility under the state Act (A 70) may be established by one or more of the following:

1. Evidence of insurance;
2. Surety bonds "conditioned to pay all costs and expenses of the cleanup of any discharge as well as damages caused to the state and any other person;"
3. Qualification as a self-insurer;

³⁵See letter from American Institute of Merchant Shipping to Capt. W. C. Dahlgren, U.S.C.G., published in *Legal Economic, and Technical Aspects of Liability and Financial Responsibility as Related to Oil Pollution*, A Study By the Program of Policy Studies in Science and Technology, George Washington University, For the United States Coast Guard (Dec. 1970) at pages 4-445 - 449.

³⁶*Id.* at pages 4-2 and 4-3.

4. Other evidence of financial responsibility satisfactory to the Department.

It should be noted that under the statutory wording only the surety bond provision expressly requires unlimited liability; the insurance provision does not.

In practice, the financial responsibility requirement has been supplemented in three ways, two of which make compliance easier, and one of which makes compliance more difficult.

(1) Rules issued by the Department of Natural Resources, State of Florida, (A 74) require that a showing of financial responsibility need be established only in "an amount not to exceed" \$100 per gross ton of a company's largest vessel or \$5 million, whichever is lower; and

(2) Under the "other evidence" method of financial responsibility the Department accepts certified financial statements which show financial responsibility sufficient to meet the foregoing standard of \$100 per ton up to \$5 million (Transcript of Testimony, Hearing on Application for Temporary Restraining Order. pp. 237-238); but

(3) Despite the foregoing \$100 per gross ton or \$5 million limitation, the rules require that proof of financial responsibility by "evidence of insurance" must be by a policy of unlimited liability, "conditioned to pay all costs and expenses of the cleanup of any discharge as well as damages caused to the state and any other person." This provision was apparently put in the rules as a copy of the surety bond provision. As has been noted, no insurance company will write a policy for unlimited liability. The effect of this rule, therefore, is to eliminate insurance as a method of qualifying under the financial responsibility provisions of the Act. But it does not follow from this that the statutory requirement of evidencing financial responsibility is consequently unconstitutional or impossible to comply with.

The maritime interests have, as a matter of fact, demonstrated the practicality of the "other evidence" method of qualifying. As of the time of the TRO hearing, 28 applications for certification had been approved covering a total of 669 ships, 438 of U.S. registry and 231 foreign (Transcript of Testimony, Hearing on Application for Temporary Restraining Order, pp. 234-235).

Nevertheless, maritime interests argue that they cannot qualify on their financials because to do so would be to subject themselves to unlimited and uninsured liability. This, of course, is a non-sequitur and completely invalid.

Maritime interests may have a legitimate objection to the rule for qualification by insurance, since it requires a policy without limits. But this objection goes to the reasonableness of that condition as predicate for financial responsibility certification, and *has nothing to do with the scope of their liability*. In no event can the possible unreasonableness of a prerequisite to one of several methods for satisfying financial responsibility published in a Department of Natural Resources Regulation sustain a practical argument against unlimited and absolute liability.

During congressional hearings which led ultimately to passage of the Federal Act, absolute liability was considered by many to be necessary. It was attacked by maritime interests on grounds that absolute liability was *inequitable*. Examples were cited describing such inequity. Through no fault of a shipowner, a vessel might strike a mine, or be "overwhelmed" by a hurricane or subject to some other natural calamity at sea.³⁷

This argument raises two comments: first, it only contemplates a small part of the tragedy, only that segment occurring at sea. It implies an innocent owner or charterer sending an innocent vessel on innocent passage through innocent sea;

³⁷Hearings on HR 6495, HR 6609, HR 6794, and HR 7325 *Before the House Committee on Merchant Marine and Fisheries*, 91st Cong., 1st Sess. 261-69 (1969).

suddenly a victim of violent, unforeseen forces that break open the vessel, threaten lives of passengers and crew, and cost the owner a lot of money. It misses the rest of the picture.

It fails to consider the fact that the owner is probably a heavily insured corporation deriving most of its profits from leasing bottoms to charterers, most of whom would be oil companies who would not have sent the vessel loaded with crude oil through the hurricane latitudes were it not necessary in order to maintain and operate a highly profitable business enterprise. It fails to consider the fact that the vessel, cargo, and freight, in all probability, are insured. Mostly, it fails to consider the nature of the cargo. Crude oil pollution of property ashore and territorial waters of nearby states should also be contemplated. Adverse effects of ecological and economic damage inflicted on equally innocent, non-maritime property owners are ignored completely.

Secondly, implications of the resistance to absolute liability in arguments before the House Committee describe an anachronistic concept of tort liability: that because the owner of a vessel is blameless of the hurricane, he should be absolved of blame for the loss suffered and therefore immune to damages compensating for that loss.

* * * A modern tort-law commentator would have responded that the question today is not one of fault or blame but rather who is in the best position to bear the losses or distribute the risk. Should it be the adjacent shore owner who had absolutely no relationship to the vessel or its cargo, indeed, did not even know of its existence until the oil spilled on his beach, or [should it be] the government paying for clean-up costs out of the public treasury? Or should it be the vessel-owner, together with the cargo-owner, who profit from the carriage contract, appreciate the full risks that are involved, and are in the optimum position to bear the losses or distribute those risks through self, mutual or other forms of insurance?³⁸

³⁸ Mendelsohn, *Maritime Liability for Oil Pollution*, 38 *George Washington Law Review* 1, (October 1969), at pages 14-15.

It is submitted that absolute liability is required by the circumstances. A massive oil-spill in its territorial waters is no less dangerous to the health and welfare of a state than a major conflagration, hurricane, or other natural disaster would be.³⁹ Moreover, liability must be measured by damage proven. To limit claims by an arbitrary and unrelated yardstick, such as tonnage of the vessel or value of the wreck, is utterly without foundation in reason, fairness or justice. In providing unlimited liability without fault, the Florida Act seeks to protect fundamental state interests. It is a valid exercise of the police power. *Crowell v. Benson*, 285 U.S. 22 (1932); *Chicago R.I. & P.R. Co. v. Eaton*, 183 U.S. 588 (1901); *Sherlock v. Alling*, 93 U.S. 99 (1876); *The China v. Walsh*, 74 U.S. (7 Wall) 67 (1868).

Reasons for the exercise have been described. Authority for the exercise and why it is not an unconstitutional conflict with Federal prerogatives is discussed below.

C. Police Power is Power to Protect.

*"It may be said in a general way that the police power extends to all the great public needs."*⁴⁰

*"The right of the citizen not to have his property burned without compensation is no less to be regarded than the right of the corporation to set it on fire."*⁴¹

*"Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional applications of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it . . ."*⁴²

³⁹Shutler, *Pollution of the Sea by Oil*, 7 *Houston Law Review* 415, 418-419 (March 1970).

⁴⁰Mr. Justice Holmes in *Noble State Bank v. Haskell*, 219 U.S. 104, 111 (1911).

⁴¹Mr. Justice Gray in *St. Louis & San Francisco Ry. Co. v. Mathews*, 165 U.S. 1, 26 (1896).

⁴²Mr. Justice Douglas in *Berman v. Parker*, 348 U.S. 26, (1954).

(1.)

If the State cannot secure a remedy
when its citizens have been wronged then
the police power of the State is little
more than an academic curiosity.

If the state is powerless to protect its citizens and its environment from the ravages of oil-spill pollution caused by ships calling at its ports, or by corporate entities chartered by it, or by businesses licensed by it, then it fails to meet one of the essentials of good government, for it has failed in its duty to protect property.

The argument of maritime interests, reduced to its last analysis, is this: the terminal companies and maritime interests may lawfully use, store, and transfer pollutants, and as they are pursuing a lawful business, they are only liable for negligence in its operation; and when in a given case they can demonstrate they are guilty of no negligence, then they cannot be made liable.

To this the citizen answers: 'I also own my property lawfully and have a lawful right to enjoy the environment of the State. I did not do anything to bring about the spill of pollutants into state waters. You say you are guiltless of negligence. Yet the waters are polluted and the air is fouled as a result of a discharge from the operation of your agency, albeit careful and cautious and prudent. And I am denied redress even though I have done nothing to in anyway bring about such a discharge.' (Paraphrased from *Campbell v. Missouri P.R. Co.*, 121 Mo. 340, 25 S.W. 936, 25 L.R.A. 175 (1894); quoted with approval in *St. Louis & San Francisco R. Co. v. Mathews*, 165 U.S. 1 (1896). Neither case involved water pollution, but the rationale of both cases is analogous to the instant controversy.)

It may be that prior to the State Act, shippers and terminal owners were only liable for negligence in an occurrence causing water pollution, and that, where this criterion of tort liability could not be proven, the citizen was without redress.

But it does not follow from this that the legislature is, therefore, powerless to ever enact legislation granting needed protection to its citizens in the form of absolute liability for the damages proven as a result of their acts. That is what the legislature has done. It has made those who traffic in pollutants responsible for damage to property and to the environment caused by those pollutants upon discharge into the waters of the state. It is perfectly competent for the state to do so. To deny this is to stand for the proposition that the ultimate burden for oil-spill pollution is properly that of the private citizen and not those whose instrumentality caused the discharge. That it may have been so in the past does not mean that it must continue to be so in the present or for the future.

The police power of the state is peculiarly appropriate to the object sought to be achieved by the State Act. While this is a case of first impression before this Court, state statutes purporting to impose absolute liability upon railroad corporations for all property lost through fires caused by sparks emitted from locomotive engines have been upheld against constitutional attack. *St. Louis & San Francisco Ry. Co. v. Mathews*, *supra*; II *Cooley Constitutional Limitations* (8th ed.) Ch. XVI, p. 1244. The words of Mr. Justice Gray in the above cited case, 165 U.S. at p. 26, are applicable:

*** It is within the authority of the legislature to make adequate provision for protecting the property of others against loss or injury by sparks from such engines. The right of the citizen not to have his property burned without compensation is no less to be regarded than the right of the corporation to set it on fire. To require the utmost care and diligence of the railroad corporations in taking precautions against the escape of fire from their engines might not afford sufficient protection to the owners of property in the neighborhood of the railroads. When both parties are equally faultless, the legislature may properly consider it to be just that the duty of insuring private property against loss or injury caused by the use of

dangerous instruments should rest upon the railroad company which employs the instruments and creates the peril for its own profit rather than upon the owner of the property, who has no control over or interest in those instruments The statute is not a penal one, imposing punishment for a violation of law; but it is purely remedial, making a party doing a lawful act for its own profit liable in damages to the innocent party injured thereby, and giving to that party the whole damages measured by the injury suffered. (citations omitted)

To argue that the police power of the State does not reach as far as Florida's position requires is to overlook the breadth of the police power itself. In *Berman v. Parker* 348 U.S. 26 (1954), Mr. Justice Douglas described the breadth of the police power in terms which would surely encompass circumstances in which the State Act was passed.

To suggest that the State cannot control such pollution because it is beyond the scope of the police power, is to overlook further the landmark case of *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960). In this case, a corporation engaged in operating Federal licensed steam vessels in interstate commerce sought to enjoin enforcement of the city's Smoke Abatement Code. Under the Code, the corporation's steam vessels could not perform necessary cleaning of their boilers within the city without undergoing structural alteration. This Court upheld the ordinance and ruled that the Code could constitutionally be applied to the corporation's ships rejecting the argument that Federal statutes relating to inspection, approval, and licensing of steam vessels in interstate commerce preempted the area, and that the Code was an unconstitutional burden on interstate commerce. Said Mr. Justice Stewart for the seven-man majority at 362 U.S. 442:

"The ordinance was enacted for the manifest purpose of promoting the health and welfare of the city's inhabitants. Legislation designed to free from pollution the very air that

people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power. In the exercise of that power, the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government. * * * (Citations omitted).

"* * * Evenhanded local regulation to effectuate a legitimate local public interest is valid unless pre-empted by federal action * * * (Citations omitted).

"In determining whether state regulations has been pre-empted by federal action, 'the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State.' *Savage v. Jones*, 225 U.S. 501, 533, 56 L ed 1182, 1195, 32 S Ct. 715."

It is clear from the *Huron Portland Cement* case that an attack on the State Act based upon a violation of Art. I, § 8 of the Constitution must fail, for the mere fact that a State statute imposes a burden on commerce is not enough. There must be more. There must be a conflict with the Federal scheme of things. It is the imposition of the inconsistent duties or obligations making dual compliance impossible which is prohibited. See, also *Cooley v. Board of Port Wardens*, 12 How. 299 (1851) which teaches that states under their police power can adopt regulations in matters of local concern even though, in some measure, they affect and regulate interstate and maritime commerce.

Thus it is not merely a question of whether Congress has acted in a given field that determines whether states are preempted from exercising their reserved powers. The congressional act must specifically exclude state legislation, and it must do so on clear constitutional authority. *Kelly v.*

Washington, 302 U.S. 1 (1937), reviews the cases, and observes at page 14:

When the State is seeking to prevent the operation of unsafe and unseaworthy vessels in going to and from its ports, it is exercising a protective power akin to that which enables the State to exclude diseased persons, animals and plants. These are not proper subjects of commerce. When the State is seeking to protect a vital interest, we have always been slow to find that the inaction of Congress has shorn the State of the power which it would otherwise possess. And we are unable to conclude that so far as concerns the inspection of the hull and machinery of these vessels of respondents in order to insure safety and seaworthiness, the Federal laws and regulations, which as we have found are not expressly applicable, carry any implied prohibition of state action.

It should be noted at this juncture—although it will be discussed in detail below—that the Federal Act does reach wrongs with which the State Act is concerned. But it can hardly be said to foreclose state legislation. In the first place, the Federal Act *provides no remedies to other than Federal agencies*, and, in the second place, it expressly disclaims any trace of preemption. Thus, it can hardly be maintained that Congress has precluded the exercise of state police power in the area of oil-spill pollution of territorial waters.

Nor should it be maintained that, in the absence of congressional action in specific areas reached by the State Act, necessity of uniformity of regulation is imposed by Article III, Section 2, United States Constitution, merely because the nature of the concern is maritime. The nature of the concern was maritime in *Cooley v. Board of Port Wardens*, *supra*; *Ex parte McNeil*, 13 Wall. 236 (1872); *Gilman v. Philadelphia*, 3 Wall. 713 (1866); *Mobile County v. Kimball*, 102 U.S. 691 (1881); *Packet Co. v. Catlettsburg*, 105 U.S. 559 (1882); *Escanaba & L.M. Transp. Co. v. Chicago*, 107 U.S. 678 (1883); *Parkersbury & Ohio River Transp. Co.*

v. Parkersburg, 107 U.S. 691 (1883); *Morgan's L. & T.R. & S.S. Co. v. Board of Health*, 118 U.S. 445 (1886); *Manchester v. Massachusetts*, 139 U.S. 240 (1891); *Lawton v. Steele*, 152 U.S. 133 (1893); *Lee v. New Jersey*, 207 U.S. 67 (1907); *Port Richmond & B.P. Ferry Co., v. Hudson County*, 234 U.S. 317 (1914); *Wilmington Transp. Co. v. Railroad Commission*, 236 U.S. 151 (1915); *Kelly v. Washington*, *supra*; *Skiriotes v. Florida*, 313 U.S. 69 (1940); *C. J. Hendry Co. v. Moore*, 318 U.S. 133 (1943); and *Huron Portland Cement Co. v. City of Detroit*, *supra*. In each case the Court was confronted with a local regulation or enactment affecting maritime commerce or asserted to be exclusively within admiralty and in each case the local regulation was sustained as an appropriate exercise of the police power. Cf. *Clyde Mallory Lines v. State of Alabama*, 296 U.S. 261 (1935).

Requiring vessel owners and operators to maintain financial responsibility is certainly permissible within the police power. It is a means—the only means—of enforcing that which might otherwise be unenforceable.

In like effect, requiring any vessel transporting pollutants in state waters to be equipped with specific containment gear and a crew trained in its use is necessary not only for safety of the port, but also to facilitate commerce by keeping navigation open for vessels entering and leaving the port. For safety-sake, a vessel can be refused entry altogether or allowed to enter under conditions prescribed for safety of the port. There is no conflict with maritime law merely because the regulations are set out in a statute. To require containment gear and a trained crew is not an unreasonable regulation of maritime commerce, anymore than certain requirements imposed by states upon trains, buses, trucks or aircraft represent an unreasonable burden on interstate commerce, i.e. *Maurer v. Hamilton*, 309 U.S. 598 (1939); *South Carolina v. Barnwell Bros.* 303 U.S. 177 (1937); *Southern P. Co. v. Arizona*, 325 U.S. 761 (1932); *Sproles v. Binford*, 286 U.S. 374 (1931).

To require minimum sea conditions and a sound ship as requisite to entry and unloading operations is also reasonable for protection of the port.

The Florida Act subjects vessels to inspection by a port manager to determine presence of the required containment gear and seaworthiness of the ship. This is not new to maritime law, nor is it unreasonable; particularly when an oil-spill has been legislatively determined to be of sufficient threat to the health, welfare, and public safety to warrant an exercise of the police power. To require containment gear and not be able to ascertain its presence is to create an unenforceable requirement. That necessary gear to contain a spill was *not* present in a given instance would be unascertainable until the oil-spill occurred; and then it would be too late. If the requirement of containment gear is valid at all, police power would substantiate enforcement. Enforcement measures cannot effectively omit boarding and inspection. See *Kelly v. Washington*, *supra*; *Morgan's L. & T. Railroad and Steam Ship Co. v. Louisiana Board of Health*, *supra*. To the extent that such measures are an imposition upon maritime commerce, then maritime commerce must learn to accomodate them—as it has in the past.

Mechanics of the Florida Act are not new to this Court. In one form or another, they have met with judicial approbation before. They have been sanctioned precisely because they are reasonable means to accomplish the end sought to be achieved. Effective exercise of the police power would be frustrated without them.

Although argued and briefed in the District Court, the order and memorandum opinion appealed from make no mention of the police power. It is this failure to recognize the Florida Act for what it is that led the court to error.

But had the phrase 'police power' never been coined, it would matter little to the final analysis of this case. For the people never surrendered their power to protect against such evils as are contemplated in an oil-spill. Whatever the power to protect in this context be called, the Tenth Amendment is a gentle reminder that it was reserved to the states.

(2.)

Power to protect shore property and the State's natural resources from deleterious effects of a massive oil-spill was reserved to the State.

It is a power and a responsibility peculiarly adaptable to the State. The State has the capacity and, most importantly, the motivation to act in this area to protect itself and its citizens. There is no express delegation of the power to the Federal domain. The Amendment qualifies all grants.

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Article III, Section 2 (A 94) was found by the District Court to have been offended by the State Act (A 47), but there is no express delegation of power there. That Section speaks to jurisdiction of the Federal courts, and it is respectfully submitted that it should be recognized for what it is. It says the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction. For purposes of this controversy, that is all it says. It does not say that substantive maritime law shall extend shoreward to frustrate police power of the state.

To a disturbing extent, from the states' point of view, judicial pronouncements in *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), and *Knickerbocker Ice Company v. Stewart*, 253 U.S. 149 (1920), relied upon by the District Court to support invalidation of the Florida Act, construe the Admiralty Clause in such fashion as to ignore state sovereignty altogether. On their face, those cases establish an autonomous sovereignty within the admiralty, and vest it with far greater dignity than that ascribed to state legislation. In its willingness to follow *Jensen*, and assert an allegiance to this

third dominion, which is seemingly neither state nor Federal but independent of them both, the District Court added to the legend. By 'legend' we refer to the Court's continuing endowment of additional power and scope to the relatively simple phrase in Article III, Section 2. What is, on its face a delegation of judicial power over *cases* of admiralty and maritime *jurisdiction*, has been so broadened that it now authorizes congressional action extending substantive maritime law far beyond its original limits. And each extension, judicial or legislative, more narrowly restricts the dwindling perimeters of state sovereignty.

A definition of "reserved powers" proclaimed by the Tenth Amendment might at one time have included the states' power to cope with and protect against oil-spill pollution of its territorial waters and shoreline. It was, after all, a common law tort, remedial in common law courts. *The Plymouth* 70 U.S. (3 Wall.) 20 (1865); *Ex parte Phenix Ins. Co.*, 118 U.S. 610 (1886); *Johnson v. Chicago & Pacific Elevator Co.*, 119 U.S. 388 (1886). Although commenced at sea, the tort was not consummated within the ebb and flow of the tide, *Thomas v. Lane*, 2 Sumn. 9 (1834), or on navigable waters, *The Genesee Chief*, 53 U.S. (12 How.) 443 (1851), and was therefore not an admiralty matter. The *Plymouth*, *supra*. Postulating, then, an oil-spill occurring in 1886, damaging shore property, would have triggered common law tort response from the victim; admiralty would have had no cognizance. Had a state act in 1886 imposed unlimited and absolute liability upon the offending ship's owner, the abstraction 'uniformity' would have afforded scant comfort in defense. For the common law remedy saved to suitors in the Judiciary Act of 1789, (1 Stat. 73, as amended, arguably strengthening the concurrent jurisdiction aspect, 28 U.S.C. § 1333), affords recourse not only to *processes* of state courts, but to the substance of state law as well. *The Hamilton*, 207 U.S. 398 (1907). If Federal jurisdiction carried with it law-making powers, so did concurrent state jurisdiction. *A fortiori*, where there was no concurrent jurisdiction for reason that there was no Federal maritime jurisdiction to start with,

substantive state law establishing remedies and liabilities for sea-to-shore torts would entertain no objections from admiralty.

Not being a matter within the Federal maritime domain at all, such jurisprudence could hardly be considered a subject of *exclusive* Federal jurisdiction. Hence, there was no necessity for a doctrinaire allegiance to principles of uniformity. *Just v. Chambers*, 312 U.S. 383 (1941).

If the abstract doctrine of uniformity can frustrate the states' exercise of reserved powers under the Tenth Amendment by subjecting common law tort action to the full panoply of maritime rules, the reason is almost entirely attributable to the Admiralty Extension Act of 1948, 62 Stat. 496, (June 19, 1948), 46 U.S.C. § 740, (A 93). In that Act, Congress went beyond the farthest horizons of Admiralty Clause power, expressed or inferred, explicit or implicit. The Act re-defines maritime jurisdiction in a manner totally inconsistent with either the Tenth Amendment or Article III, Section 2.

D. Extension of Admiralty: Outside the Limits.

"In regard to torts, I have always understood that the jurisdiction of admiralty is exclusively dependent upon the locality of the act. The admiralty has not, and never, I believe, deliberately claimed to have, any jurisdiction over torts, except as such are maritime torts, that is, torts upon the high seas, or waters within the ebb and flow of the tide."

—Mr. Justice Story⁴³

"I think it high time to check this silent and stealing progress of the admiralty in acquiring jurisdiction to which it has no pretensions."

—Mr. Justice Johnson⁴⁴

"Article III impliedly . . . empowered Congress to revise and supplement the maritime law within the limits of the Constitution."

—Mr. Justice Frankfurter⁴⁵

⁴³ *Thomas v. Lane*, 2 Sumn. 9 (1834).

⁴⁴ Concurring opinion in *Ramsey v. Allegre*, 25 U.S. (12 Wheat.) 611 (1827).

⁴⁵ *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 361 (1959).

(1.)

By extending scope of maritime tort
jurisdiction beyond the locality of
navigable waters, Congress exceeded
Admiralty Clause authority and intruded
upon State prerogatives.

Prior to June 19, 1948, admiralty jurisdiction over torts was limited to the maritime province. Unless it was a maritime tort, i.e., consummated upon navigable waters, it was not extended by Article III, Section 2, to the Federal see. Thus, if a structure on land, a bridge or a pier, were damaged by a vessel, admiralty courts could not hear the cause. *The Plymouth*, 70 U.S. (3 Wall.) 20 (1865); *Ex parte Phenix Ins. Co.*, 118 U.S. 610 (1886); *Johnson v. Chicago & Pacific Elevator Co.*, 119 U.S. 388 (1886); *Cleveland Terminal & Valley R.R. Co. v. Cleveland S.S. Co.*, 208 U.S. 316 (1908); *The Troy*, 208 U.S. 321 (1908); *Martin v. West*, 222 U.S. 191 (1911). But see Mr. Justice Brown, concurring, in *The Blackheath*, 195 U.S. 361 (1904).

In *The Steamboat Thomas Jefferson*, 23 U.S. (10 Wheat.) 428 (1825), seamen sued for wages in admiralty. In a four-paragraph opinion, Mr. Justice Story affirmed dismissal by the lower court for lack of jurisdiction for reason that the Missouri River voyage of the vessel was not within the ebb and flow of the tide, and, hence, "in no just sense can the wages be considered as earned in a maritime employment."

In *The Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851), Mr. Justice Taney broadened this concept to navigable waters, but he can hardly be said to have precluded necessity for getting one's feet wet before one's cause sounds in admiralty. Maritime cases and congressional authority arise not under operation of the Commerce Clause, *The Genesee Chief*, *supra*; *The Eagle*, 75 U.S. (8 Wall.) 15 (1868), nor "the Constitution or laws of the United States", *American Ins. Co. v. Canter*, 26 U.S. (1 Peter) 511 (1828). Solely within the Admiralty Clause does the source of congressional power

repose. Since congressional power can only be co-extensive with that stored in Article III, Section 2, a determination of the limits of that grant is necessary. National legislation extending beyond boundaries of that power is, by definition, without constitutional authority to conflict with state statutes. The suspicion that this trespass occurs is limited neither to our time nor subject area. See the concurring opinion of Mr. Justice Johnson in *Ramsay v. Allegre*, 25 U.S. (12 Wheat.) 611 (1827).

There is no absolute constitutional criterion for the measurements of whatever it is that is necessary and proper to enable Congress to implement Federal jurisdiction over admiralty. But it has been traditionally recognized that such implementation is limited to that which is, in substance, maritime. In the case of contracts, substance is measured by the nature of the transaction. In the case of tort, substance is measured by locality. This guide to qualitative analysis was treated as settled law 50 years ago. *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469, 476 (1922), and reiterated as recently as last December. *Victory Carriers, Inc. v. Law*, 404 U.S. , 30 L.Ed.2d 383, 387-389 (1971). This is inference only. Article III, Section 2 makes no mention of either "nature" or "locality."

The State of Florida has no particular quarrel with the inference. As a basis for placing the line of demarcation between the dominion of admiralty and that of non-admiralty at the shoreline, it comports with reason and logic. But it is unreasonable, illogical, and *dehors* the "historic view of this Court" (*Victory Carriers, Inc. v. Law*, *supra*) to extend maritime tort jurisdiction, and all that it implies, beyond the traditional admiralty domain. That is what Congress had done in The Admiralty Extension Act of 1948. It has established a beachhead of rules, limitations, and defenses peculiar to the law of the sea well within the dry-land dominion of state jurisdiction. In so doing it has forceably imposed these sea-lawyer concepts upon unwilling subjects; the states protest.

Congress, in the Admiralty Extension Act, and the District Court, in striking the State Act, ignored the protest and shaped new dimensions to maritime torts. Admiralty tort jurisdiction has been rendered amphibious. No longer does locality matter: admiralty lives as well upon the land as on the sea. In the space of one opinion, the District Court effectively *overruled* more than 150 years of this Court's interpretation of the substance of maritime law and the jurisdictional grant of Article III, Section 2.

This Court, in *Victory Carriers, Inc. v. Law*, *supra*, quoted with approval from its decision in *Healy v. Ratta*, 292 U.S. 263, 270 (1934), that "(t)he power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution." Prior to the Admiralty Extension Act of 1948, interpretations of the "judiciary sections of the Constitution" by this Court scrupulously maintained the shoreline demarcation between admiralty and non-admiralty discussed above. Congress was without judicial guidance in assaulting this long-established and judicially approved distinction between state and maritime regimes. It was also without any constitutional authority for doing so.

No act of Congress can enlarge purposes of the grant of jurisdictional power conferred in Article III, Section 2, to make it broader than the judiciary has determined to be its true limits. *The Steamer St. Lawrence*, 66 U.S. (1 Black) 523, 527 (1861). While Congressional power to determine what the maritime law throughout the United States shall be is paramount, *The Lottawanna* 88 U.S. (21 Wall.) 558, 577 (1874), the Congress must necessarily act within a sphere of judicial concepts of the substance of admiralty and maritime jurisdiction. *The Belfast*, 74 U.S. (7 Wall.) 624, 636-641 (1868); *Crowell v. Benson*, 285 U.S. 22, 55 (1931).

In extending admiralty and maritime jurisdiction over torts consummated on land, Congress ignored established judicial concepts and exceeded its authority. The Admiralty Extension Act is invalid. If the thrust of *Victory Carriers* is to continue as a compass heading to circumscribe boundaries between

state and maritime regimes, the District Court decision in the case *sub judice* must be reversed.

(2.)

Should this Court decide the Admiralty Extension Act to be valid on its face, traditional common law jurisdiction saved to suitors in 28 U.S.C. 1333 marks a preserve of concurrent state authority.

As has been noted, "extension of admiralty" is a theory of law unknown to traditional maritime jurisprudence. Courts of admiralty had no jurisdiction over torts consummated on land. Cases involving such wrongs, even though initiated on navigable waters, eluded admiralty jurisdiction altogether prior to 1948 and the Congressional enactment of 46 U.S.C. § 740. Hence, such actions could in no way be deemed to be within the *exclusive* jurisdiction of admiralty and maritime law.

If admiralty jurisdiction for such torts exists for reason that their genesis is some act or failure of action originating on navigable waters, it is solely because Congress ordained it. Perimeters of admiralty jurisdiction over such tort actions are staked out in the Admiralty Extension Act—the length and breadth of Federal dominion in this context is described there. It is purely a matter of congressional will: all that the national legislature intended for the admiralty courts to have is blueprinted in the Act. Had Congress intended such domain to be exclusively Federal, it would have been easily accomplished. In the Ships Mortgage Act of 1920, 41 Stat. 1003, 46 U.S.C. 951, for example, the exclusivity of jurisdiction is spelled out in conclusive terms. See, generally, *The Thomas Barlum*, 293 U.S. 21 (1934). Had exclusive jurisdiction been so prescribed, an argument could be made that the Admiralty Extension Act amended such "hybrid" torts out of their common law status. But legislative history of the Act indicates rather conclusively that its passage signified no intentional intrusion upon common law jurisdiction.

Adoption of the bill will not create new causes of action. It merely specifically directs the courts to exercise the admiralty and maritime jurisdiction of the United States already conferred by Article III, section 2 of the Constitution and already authorized by the Judiciary Acts. Moreover, there still will remain available the right to a common-law remedy which the Judiciary Acts... have expressly saved to claimants. * * * (Senate Report No. 1593, June 11, 1948 (To accompany H.R. 238); House Report No. 1523, March 8, 1948, 80th Cong., 2d Sess., 1948.)

Inasmuch as sea-to-shore torts (particularly within the context of oil-spill remedies) were unreachable in admiralty's formative century, and therefore well within concurrent state jurisdiction, they cannot be said to be within that chosen area of law exclusively delegated to federal maritime domain. Cf. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). Strict precepts of uniformity that bottom this Court's rationale in *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), and *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920) are not required here.

If states have concurrent jurisdiction over maritime torts, there must be available to them an area of legislative activity to develop or extend remedies for wrongs, Cf. *The Tungus v. Skovgaard*, 358 U.S. 588 (1959), and this area must be broad enough to accomodate new concepts of tort. Surely the state is not limited to antiquated forms of action, i.e., trespass on the case, in an era when experts tell us we are capable of ultimately befouling our air and water, or vitally injuring an economy based squarely on a clean environment, as Florida's is today. If "concurrent jurisdiction" is more than a theory, but is amenable to practice, then the only question at this juncture is whether the state still retains concurrent jurisdiction over maritime torts. There is no question but that it was a state prerogative when the Constitution was developed. We were reminded of this fact in the dissenting opinion of Mr. Justice Brennan in *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 404-405 (1959):

Mr. Chancellor Kent and Mr. Rawle seem to think that the admiralty jurisdiction given by the Constitution is, in all cases, necessarily exclusive. But it is believed that this opinion is founded on mistake. It is exclusive in all matters of prize, for the reason that, at the common law, this jurisdiction is vested in the courts of admiralty, to the exclusion of the courts of common law. But in the cases where the jurisdiction of common law and admiralty are concurrent, (as in cases of possessory suits, mariners' wages, and maritime torts), there is nothing in the Constitution necessarily leading to the conclusion that the jurisdiction was intended to be exclusive; and there is no better ground, on general reasoning, to contend for it. The reasonable interpretation... would seem to be, that it conferred on the national judiciary the admiralty and maritime jurisdiction exactly according to the nature and extent and modifications in which it existed in the jurisprudence of the common law. 3 Story's Comm. Sec. 1666, note. [quoted in *Taylor v. Carryl*, 61 U.S. (20 How.) 583, 598 (1857).]

Assuming that concurrent jurisdiction still means that which Mr. Justice Holmes described in *The Hamilton*, 207 U.S. 398 (1907), then substantive state law is appropriate to meet exigencies of an oil-spill age (so long as it is not in conflict with Federal law) regardless whether admiralty is extended or not. There must be room for protection the State Act affords. If such protection is provided by Federal law, then the State has no quarrel. The Florida Act is more than merely an advertisement to promote business for its courts. It is the substance of the protection that is urgent here; not the choice of court rooms.

If the protection against oil-spill pollution and damage is not afforded in the Federal sphere, of course, then this Court must consider yet another constitutional question: to what extent may the individual citizen rely upon the Ninth Amendment to reassure his fundamental right to a healthy environment?

(3.)

To the extent that Federal law fails to protect citizens of the state from loss of property and damage to natural resources, the state has a right and a duty to legislate in the area of marine oil-spill pollution control.

The essence of the District Court's opinion appealed here is that Chapter 376, Florida Statutes (1970) conflicts directly with paramount Federal enactments and is in other ways violative of admiralty's constitutional prerogatives. While the State of Florida denies any such violations or conflict, the State also maintains that even if the District Court's assertion as to conflict were correct, the State Act must be recognized as a valid expression of a fundamental right of the people to self-preservation.

Congress has recognized this right to a healthful environment. At Section 101 (c) of the National Environmental Policy Act of 1969, P.L. 91-190, 42 U.S.C. §§ 4331-47, Congress declares:

The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

The Fifth Circuit Court of Appeals has judicially acknowledged the necessity of protecting our environment for the survival of man, and has also noted the devastating effect of environmental despoilment upon interstate commerce. In *Zabel v. Tabb*, 430 F. 2d 199 (5th Cir. 1970), at pages 203-204, Chief Judge Brown stated:

In this time of awakening to the reality that we cannot continue to despoil our environment and yet exist, the nation knows, if Courts do not, that the destruction of fish and wildlife in our estuarine waters does have a devastating effect on interstate commerce.

None of the Constitutional provisions or Federal laws asserted by maritime interests can be interpreted so as to deprive the citizens of the State of Florida of their right to a clean and healthful environment. Not only is this right recognized by Congress and the Courts (see, also, dictum in *Huron Portland Cement Co. v. City of Detroit*, *supra.*), but it is also a fundamental right of the people, saved to them under the Ninth Amendment to the Constitution, which provides:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

In *Griswold v. Connecticut*, 381 U.S. 79 (1965), the Court found at page 484, per Mr. Justice Douglas, that

* * *specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.

Justice Goldberg, in a separate opinion, joined by the Chief Justice and Mr. Justice Brennan, stated, at page 487:

In reaching the conclusion that the right of marital privacy is protected, as being within the protected penumbra of specific guarantees of the Bill of Rights, the Court refers to the Ninth Amendment, ante, at 515. I add these words to emphasize the relevance of the Amendment to the Court's holding.

Continuing, at page 488, Justice Goldberg stated:

The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the First eight Constitutional Amendments.

And, at page 489:

These statements of Madison and Story make clear that the Framers *did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people.* (Emphasis Added.)

Justice Goldberg then summarized, at page 493:

In sum, the Ninth Amendment simply lends strong support to the view that the "liberty" protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments.

The Justice then explained, also at page 493, how to determine which rights are reserved under the Ninth Amendment:

In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to "traditions and [collective] conscience of our people" to determine whether a principle [is] "so rooted [there] . . . as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105, 78 L. Ed. 674, 677, 54 S. Ct. 330, 90 ALR 575. The inquiry is whether a right involved "is of such a character that it cannot be denied without violating 'fundamental principles of liberty and justice which lies at the base of all our civil and political institutions' . . ."

It should brook no argument to state that the right to a clean, healthful environment is within the "penumbra" of fundamental rights protected under the Ninth Amendment. This right as the Court recognized in *Zabel v. Tabb*, *supra*, is essentially the right to exist; certainly, it is so rooted in the tradition and collective conscience of our people as to be ranked as fundamental. The people of the State of Florida

have acted through their legislature to protect this fundamental right by the enactment of Chapter 376, Florida Statutes (1970). In the State Act, the people are asserting their right to protect their birthright to clean water, coastlines, and other natural resources from environmental destruction. Their right to take up statutes in defense of their environment is no different, except to a matter of degree, from their right to take up arms to defend against armed attack. Before this constitutionally guaranteed right, all other rights and privileges must bow.

E. The Jensen Doctrine is Inapplicable

*"The Florida Act here constitutes a far greater intrusion into the Federal maritime domain than the New York statute in the Jensen case. If applied to the plaintiffs and intervenors in this case, the Florida Act would effect—in the words of Jensen—the 'destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish . . . We need not belabor the point that to permit the states severally to regulate these industries as Florida seeks to do would sound the death knell to the principle of uniformity.'"*⁴⁶

*"We are now asked to apply the Jensen doctrine to the field of unemployment insurance and to invalidate the statute before us on the ground that it is destructive of admiralty uniformity The Jensen Case has already been severely limited, and has no vitality beyond that which may continue as to state workmen's compensation laws."*⁴⁷

(1.)

Jensen's absolute prohibitions against state legislation affecting maritime commerce must remain limited to the arena of its own facts.

⁴⁶Memorandum opinion of the District Court, A 44.

⁴⁷*Standard Dredging Corporation v. Murphy*, 319 U.S. 306, 309 (1942).

It is respectfully submitted that in drafting *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), this Court used a very broad-nibbed pen. Any state legislation was declared to be invalid when it "works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations." 244 U.S. at 216. It is difficult to conceive of a state statute affecting maritime commerce which would stand guiltless of some intrusion into those prohibited areas. Even state statutes subsequently approved by this Court, i.e., *The Tungus v. Skovgaard*, 358 U.S. 588 (1959), are not totally free of a mild trespass into that yard marked "uniformity". It is, perhaps, for this reason that a later decision limited application of the *Jensen* doctrine to workmen's compensation cases, *Standard Dredging Corporation v. Murphy*, 319 U.S. 306 (1942), and the requisite "uniformity" concept to those situations "where the essential features of an exclusive federal jurisdiction are involved." *Just. v. Chambers*, 312 U.S. 383, 392 (1941).

In any event, the District Court misapplied the *Jensen* rule in the present context. The *Jensen* decision, by strong implication at least, limits its application to those areas of jurisprudence within the exclusive federal maritime domain. At 244 U.S. 218:

* * *The remedy which the Compensation Statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court and is not saved to suitors from the grant of exclusive jurisdiction.

As discussed above, the Florida Act concerns sea-to-shore torts, triable only before common law courts at the time the *Jensen* Case was decided. If the Admiralty Extension Act can be said to bring an oil-spill damage action within maritime tort jurisdiction, it also remains within the purview of the common law as a tort. If concurrent jurisdiction exists, states are free to legislate within that jurisdiction, and the "uniformity" concept of *Jensen* cannot coexist with such

state power. In resting a corner of its case upon the Jensen doctrine in this context, the District Court erred.

F. Limitation of Liability Means No Recovery.

"Even if fault was established, the vessel-owner's financial responsibility for property damage would be limited to the value of the vessel at the end of the voyage, plus the 'freight then pending,' unless the damage was caused with the owner's privity or knowledge."⁴⁸

"That object was to enable merchants to invest money in ships without subjecting them to the indefinite hazard of losing their whole property by the negligence or misconduct of the master or crew, but only subjecting them to the loss of their investment."⁴⁹

"The notion as applicable to a collision case seems to us to be that if you surrender the offending vessel you are free, just as it was said by a judge in the time of Edward III, 'If my dog kills your sheep and I freshly after the fact tender you the dog you are without recourse against me.'"⁵⁰

(1.)

In a conflict of interests between the State in protecting against effects of an oil-spill, and the maritime in protecting shippers from claims resulting therefrom, the State's interest is dominant.

Whether or not this Court determines that the Admiralty Extension Act is invalid as applied in the context of the case *sub judice*, the problem of *Richardson v. Harmon*, 222 U.S. 96 (1911) remains. In an oil-spill frame of reference, the Limitation of Liability Act, 9 Stat. 635, 46 U.S.C. §§ 181-189, would frustrate justice regardless of the forum or legal theory applicable. In *Richardson*, a tort claim arose from collision of a ship with a bridge. A limitation proceeding was upheld despite the non-maritime nature of the tort.

⁴⁸Memorandum opinion of the District Court, A 43.

⁴⁹Mr. Justice Bradley in *The City of Norwich*, 118 U.S. 468, 504 (1886).

⁵⁰Mr. Justice Holmes in *Liverpool, Brazil & River Plate Steam Nav. Co. v. Brooklyn E. Dist. Terminal*, 251 U.S. 48, 53 (1919).

In *Moragne v. States Marine Lines*, 398 U.S. 375, (1970), this Court discarded antiquated notions circumscribing recovery in a wrongful death action, and overruled *The Harrisburg*, 119 U.S. 199 (1886). Underlying the Court's rationale was a concern that it was unfair and unjust for general maritime law to allow recovery for injury, but not for death. There was no justification for the dichotomy beyond a stultified adherence to the ancient felony-murder doctrine. Rule had supplanted reason. No one knew *why The Harrisburg* held as it did; the fact of the holding was sufficient for subsequent cases. See, *The Tungus v. Skovgaard*, 358 U.S. 588 (1959).

The State of Florida is not unaware of the reluctance of the Court to overrule precedent. But if *Richardson v. Harmon*, *supra*, is of sufficient vitality to permit limitation proceedings to frustrate fair recovery in a common law tort action for damages to shore property arising from an oil-spill, then that case must be overruled or sharply limited in application. Reasons underlying development of the concept of limitation of liability never contemplated the severe damage of a massive oil-spill. Public policy on the side of the state is far more urgent than that on the side of maritime interests, particularly with marine liability insurance weighed into the balance. There is no justification today for protecting owners and charterers of tankers to the detriment of the State and its citizens.

The Limited Liability Act cannot co-exist in the same courtroom with the Florida Act. Although 46 U.S.C. § 183 is limited to sea-going vessels, § 188 applies the limitation to "all vessels used on lakes or rivers or inland navigation, including canal boats, barges, and lighters," and § 189 has been construed to abrogate common law rights to substantive remedies saved to suitors altogether. Compare, *Richardson v. Harmon*, *supra*, with *The Hamilton*, 207 U.S. 398 (1907), and *Ex parte Phenix*, 118 U.S. 610 (1886); see Gilmore and Black, *THE LAW OF ADMIRALTY* (1957), at p. 677. Lower courts have indicated rather conclusively that state statutes and local ordinances which regulate maritime commerce on

canals and harbors have no effect upon limitation proceedings under the Act. *The Grand Republic—The Nassau*, 29 F.2d 37 (2d Cir. 1929); *The South Shore*, 35 F.2d 110 (3rd Cir. 1929) *cert. den.* 281 U.S. 722 (1930); *The Central States*, 9 F.Supp. 934 (E.D.N.Y. 1935).

There is no question but that particular advantages afforded maritime interests by the Limitation of Liability Act would, assuming continued vitality of *Richardson v. Harmon*, *supra*, and 46 U.S.C. § 189, clash head-on with absolute and unlimited liability aspects of the Florida Act. But it also conflicts directly with Section 1161 (f) of the Federal Act (A 81). For the Federal Act, "notwithstanding any other provision of law", imposes liability upon "such owner or operator of any vessel from which oil is discharged in violation... for the actual costs incurred... for the removal of such oil by the United States Government in an amount not to exceed \$100 per gross ton of such vessel or \$14,000,000, whichever is lesser...." The section goes on to state that the costs shall constitute a maritime lien against the vessel and that an *in rem* action may be brought against the vessel to collect the amount due. But more significantly, it further provides that an action may also be brought against the owner or operator of such vessel in any court of competent jurisdiction to recover such costs. Limitation of liability codified with 46 U.S.C. § 183, gives way before the emphatic (and subsequent) language of the Federal Act.

Having given way before the Federal Act, are these maritime fictions elastic enough to snap back into place to frustrate a legitimate exercise of the police power of the state? Defendants submit that they are not, that what is appropriate for a Federal act purporting to control water standards is no less appropriate for a state act seeking to achieve the same end.

Dominant state interests which would be frustrated by unbridled application of the Limitation of Liability Act have been described above. But there is another basis for denying this particular aspect of maritime law as a ground for striking

the Florida Act. It is contemplated in the phrase "due process of law", and it is the fundamental right of every individual deprived of his property or the use of it by operation of the government.

(2.)

**Limitation of liability in the
present context is a bad use of
a good legal theory.**

Limitation of ship-owners' liability first appeared in the 14th Century as a means of encouraging investment in shipping. *The Rebecca*, 20 F. Cas. 373, 376 (No. 11, 619) (D. Me. 1831); Gilmore and Black, *THE LAW OF ADMIRALTY*, (1957) pp. 663-667; Note, 35 Columbia L. Rev. 246 (1935). Shipping was risky business, and insurance was unknown. It was necessary to devise a means whereby one's entire fortune didn't go down with part of it in a loss at sea. Limitation of liability concepts were developed to meet the risks and by 1800 had been codified in most maritime countries. The United States enacted its first limitation statute fifty years later. 9 Stat. 634 (1851), as amended 46 U.S.C. §§ 181-189 (1964). Like other legislation, it was congressional response to an unfortunate occurrence at sea. When the *S. S. Lexington* left the port of New York in 1840, part of its manifest included a box, contents unknown. When it sank, its owners were held liable for the full value of those contents: \$18,000 in gold. *New Jersey Steam Navigation Co. v. Merchants' Bank of Boston*, 47 U.S. (6. How.) 344 (1848). The Limitation of Liability Act was, in part, a result of this case.

Statutes of limitation were designed to insulate ship-owners from claims of cargo-owners and passengers who have contracted with the ship-owner, or his agent, for carriage or passage. Presumably passengers and cargo-owners are fully aware of the risks of maritime transport. Possibility of negligence on the part of captain or crew is an accepted hazard. The parties are *in privity*, so to speak, and it is neither unreasonable nor improper that this voluntary rela-

tionship should subject them to peculiarities of the law of the sea, not the least of which is a limitation of the owner's liability.

But what of parties not *in privity* with operation of cargo or passage, whose only relationship is an unwilling one in that they have been damaged by some maritime instrumentality? Is it reasonable or proper that persons innocent of the sea should be subject to its laws?

Since its creation in 1851, the Limitation of Liability Act has been legislatively and judicially extended to cover subjects, situations, and localities which would have seemed revolutionary to owners of the *S. S. Lexington*. It has been extended to all navigable waters, regardless of size, 24 Stat. 80 (1886), to all vessels regardless of size or employment, *The Titanic*, 233 U.S. 718 (1914); Harolds, *Limitation of Liability and its Application to Pleasure Boats*, 37 Temp.L.Q. 423 (1964), and to torts consummated on land, *Richardson v. Harmon*, 222 U.S. 96 (1911), including massive oil-spills, *In re Barracuda Tanker Corporation*, 281 F.Supp 228 (S.D.N.Y. 1968), *modified* 409 F.2d 1013 (2d Cir. 1969).

Extension of limited liability to lakes and pleasure craft is questionable; its extension to frustrate recovery by innocent parties ashore is unconscionable. When it crosses the shoreline, as in *Barracuda Tanker*, it crosses the limits of constitutionality. For it has the effect of (a) leaving the *locality* of the constitutional grant in Article III, Section 2, discussed above, and (b) violating the Fifth Amendment right to substantive due process of law necessarily attendant to any deprivation by government of private property for a public purpose. (And if there is no public purpose advanced in the Limited Liability Act, then there is no foundation for the law in the first place.)

The distinction in application of the Limitation of Liability Act demonstrated here is not a distinction without a difference. For it is not unreasonable to require a cargo-owner who has contracted for carriage of his goods to be limited in his recovery. Carriage of Goods By Sea Act, 49 Stat. 1207

(1936) § 8, 46 U.S.C. § 1308; the Harter Act, 27 Stat. 445 (1893) § 6, 46 U.S.C. §§ 190-195. He is deemed to have contracted for such services with full knowledge of limitation. But to impose the limitation formula upon the recovery of a beach-front hotel owner is to deprive him of a necessary element of substantive due process.

If we define substantive due process as a constitutional guarantee that no person shall be deprived of his property for arbitrary reasons without meaningful recourse, the difference in the distinction becomes clear. Such deprivation of property is constitutionally acceptable only if the conduct from which the deprivation flows is proscribed by reasonable legislation reasonably applied. The implication here is that the legislation must be applied for the purposes intended, and that those purposes must comport with the Constitution. The essence of substantive due process is freedom from arbitrary action with property no less than life or liberty. Cf. *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799 (1950); *United States v. Causby*, 328 U.S. 256 (1946); *Nebbia v. New York*, 291 U.S. 502 (1933); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *Twining v. New Jersey*, 211 U.S. 78 (1908).

To the extent that a massive oil-slick smears a beach-front hotel thereby driving away guests and hurting his other business, the owner of the hotel should have a remedy. If under limitation proceedings, the ship-owner may limit his liability to the hotel-owner by the value of a sunken wreck, the plaintiff is deprived of the basic element of his right, to wit, compensation. Remedial action afforded in admiralty courts, or in commonlaw courts occupied by the Limitation of Liability Act, is no remedy at all in this context. To the extent that an act of Congress compels this deprivation of property without due process of law, the Fifth Amendment is violated. If the Limitation of Liability Act is not unconstitutional on its face, it quickly becomes so under this application. Due process of law is a concept intended to protect individuals from such an arbitrary exercise of government power "unrestrained by the established principles of private rights and distributive justice." *Twining v. New Jersey*, *supra*.

In a totally different context, Mr. Justice Frankfurter once commented: "The use of a legal remedy devised for a simple situation might in a totally different environment become a perversion of that remedy." *Mayo v. Lakeland Highlands Can Co.*, 309 U.S. 310, 322 (1939).

This is the heart of the problem. To employ limitation of liability in a manner never intended (nor even conceived when the act was passed) to frustrate full recovery of a claimant under circumstances to which the Florida Act is directed, is a perversion of the original intent of the Limitation of Liability Act and an unconstitutionally arbitrary use thereof.

The Florida Act seeks to provide a remedy for its citizens where none exists. May an unconstitutional application of a maritime statute be the basis for striking the Florida Act? The State respectfully submits that it may not.

II

The Water Quality Improvement Act of 1970 In No Way Preempted the States From Imposing Requirements and Liabilities to Protect Against Massive Oil-Spill Pollution of Their Territorial Waters—Instead, It Describes A Joint Federal-State Scheme to Combat A Serious Economic and Environmental Problem.

A. Preliminary Statement

"Our environmental problems stem largely from a pressing need to emerge from the entire system of legal theory and precedent that guided us during the first century of industrialization in this country."⁵¹

To consider issues arising under this general question, it is necessary to define relative positions. To declare position is to imply certain priorities. The position of the State of Florida

⁵¹Hon. Edmund S. Muskie, *Torts, Transportation, and Pollution: Do the Old Shoes Still Fit?* 7 *Harvard Journal on Legislation* 477, 492 (1970).

rests on several premises. First, that there will be no "losing side" to this controversy. Issues at bar are so far-reaching and of such serious social, economic, and environmental consequence that, once resolved, the whole fabric consisting of state, Federal, and maritime interests, will be benefitted. Second, this case should not be decided solely upon historical interests asserted by state or maritime parties as predominate, one over the other. Nor is it appropriate to arrive at a holding based solely upon prior decisions. For cases supporting exercise of the state police power, and those establishing rigid principles of uniformity in matters maritime are of equal dignity; they form long lines, but on parallel planes. The last word in either cause will probably not be spoken here. If jealously guarded prerogatives of state and maritime interests receive added impetus in new directions as a result of this appeal, it will be incidental to the essential question decided.

It is true that Florida has a responsibility to protect its citizens and its environment from dangers of a massive oil-spill, assuming that no other protection is afforded. We do not understand the District Court or maritime interests to deny this. It is equally true that maritime law, if not a *corpus juris* existing independently of state and national influences, must continue to develop in a cohesive, universally recognized pattern. Florida has no quarrel with this.

These ambitions are not mutually exclusive. That they conflict in the instant appeal is because they were considered by the District Court in terms of hornbook precedent. But dogmas of the stormy past, to paraphrase Mr. Lincoln, are inappropriate to govern crises of the age of supertankers. Rules of decisions applicable to wrongful death or workmen's compensation cases cannot be rigidly applied in this context. "Uniformity" is an abstraction; it cannot be the *sine qua non* of every regulation affecting maritime commerce. Causes of regulation will not be the same in each instance. Where problems to be controlled differ, regulations effecting control will differ.

It is the position of the State of Florida that the State Act should not be judged by its conflicts with ancient tenets of maritime law, but by its response to challenges expressed in the Federal Act. Those challenges call for a combined Federal-State operation to combat a major threat to our environment. To the extent that the maritime industry resists this response, it sets itself apart, disputing not merely the State of Florida, but the national policy as expressed in the Federal Act, and the urgent priorities of other coastal states as well.

B. The Federal Act

*"It is a question of the first magnitude whether the destiny of the great rivers is to be the sewers of the cities along their banks or to be protected against everything which threatens their purity. To decide the whole matter at one blow by an irrevocable fiat would be at least premature."*⁵²

*"Historians have noted that over the centuries, Oriental despotism has been associated with centralized control of water resources."*⁵³

(1.)

As compared to the Florida Act,
The Federal Act defines the problem and
declares national policy while
contemplating State participation in the
enforcement of it.

Congress declares it to be policy of the United States
"... that there be no discharge of oil into or upon the
navigable waters of the United States, adjoining shorelines, or
into or upon the waters of the contiguous zone." § 1161 (b)
(1); A 76, and prohibits such discharge in harmful quantities,

⁵²Mr. Justice Holmes in *Missouri v. Illinois*, 200 U.S. 496, 521 (1906).

⁵³Graham, *DISASTER BY DEFAULT: POLITICS AND WATER POLLUTION*, 25 (1966). The remark is attributed to a corporate official at a legislative hearing, and is quoted in Note, *Private Remedies For Water Pollution*, 70 Columbia L. Rev. 731 (1970).

§ 1161 (b) (2), A 76. The Florida Act prohibits discharge of defined pollutants, § 376.03 (7); A 58, "into or upon any coastal waters, estuaries, tidal flats, beaches, and lands adjoining the seacoast of the state . . ." § 372.04; A 59-60, for reason that preservation of the use of the seacoast is "a matter of the highest urgency and priority . . ." § 376.02 (1) (2); A 56. Certainly, navigable waters of the United States include coastal waters and estuaries of the State of Florida. To this extent, the two Acts over-lap in territorial application. Also, the area denominated "coastal waters" in the Florida Act must be limited to state territorial waters. This does not include the contiguous zone on the Atlantic coast, but does so on the Gulf coast. *United States v. Florida*, 363 U.S. 121 (1960). The Federal Act could conceivably exempt certain spills occurring in the contiguous zone, § 1161(b)(2)-(3); A 76-77, but the Florida Act would not. A vessel entering or leaving any Florida port would be within the territorial application of the Florida Act and would be liable under the Act for a discharge occurring within the three mile limit on the Atlantic and within three marine leagues of shore in the Gulf of Mexico.

The Federal Act provides certain defenses. § 1161(f)(1); A 81. The Florida Act does not; although a hearing panel may decide defenses similar to those in the Federal Act are appropriate to a given case, and waive reimbursement for cleanup costs and penalties. § 376.11(6)(c); A 67-68.

The Federal Act limits liability for cleanup costs to the lesser of \$100 per gross ton of the vessel or \$14,000,000, unless the United States can show that willful negligence or misconduct "within the privity and knowledge of the owner" caused the discharge. § 1161(f)(1) A 81. The Florida Act holds an offending licensee absolutely liable (subject to possible application of defenses noted above) for "all costs of cleanup or other damage incurred by the state and for damages resulting from injury to others." § 376.12; A 68.

Both Acts provide civil penalties for their violation. The Federal Act imposes up to a \$10,000 penalty upon owners or

operators of vessels or onshore or offshore facilities "from which oil is knowingly discharged" in violation of the Act, and allows for "compromise" of the sum assessed. § 1161(b)(5); A 77-78. In addition, the Federal Act calls upon the President to issue regulations "consistent with maritime safety and with marine and navigation laws" establishing procedures for removal of discharged oil, criteria for implementation of contingency plans, containment gear requirements, and inspection of vessels and cargo, § 1161(j)(1); A 85, then imposes a \$5,000 penalty upon owners, operators, and other persons subject to regulations described who fail or refuse to comply therewith. § 1161(j)(2); A 85. The Florida Act subjects violators of the statute or regulations of the Department of Natural Resources to civil penalties of up to \$50,000, with each day the violation occurs constituting a separate offense. However, if the discharge is promptly reported and removed, penalty provisions do not apply. § 376.16; A 71.

Both Acts require evidence of financial responsibility on the part of owners or operators of vessels. The Federal Act requires such of vessels over 300 gross tons measured by \$100 per gross ton up to \$14,000,000 to meet the liability of the United States. Where one owner operates, owns, or charters more than one vessel, financial responsibility is measured by the tonnage of the fleet's largest vessel and no more is required. Claims may be brought directly against the insurer. § 1161(p)(1); A 88.

Under the Florida Act, financial responsibility requirements are imposed upon owners and operators of terminal facilities as well as vessels. The evidence of such financial responsibility is measured by capacity of the terminal facility, tonnage of the ship, cargo carried and "other similar factors" to which the vessel could be subject under the Act. No limitations upon the amount of financial responsibility to be required by the Department of Natural Resources are set forth in the statute. Direct action against an insurer for costs of cleanup, civil penalties, and damage claims is provided. § 376.14; A

70. The direct action provision should cause no difficulty in light of recent trends, *Cf. Maryland Casualty Co. v. Cushing*, 347 U.S. 409 (1954).

Both statutes provide for boarding vessels to enforce their respective provisions, and both provide criminal sanctions. The Federal Act provides that one authorized by the President may board and inspect vessels covered by the Act and arrest anyone who violates any section of the Act or appropriate regulations "in his presence or view." § 1161 (m); A 86. As noted above, the President may also issue regulations related to boarding and inspection of vessels, § 1161(j)(1); A 85. Any person in charge of a vessel on onshore or offshore facility who fails to immediately report a discharge of which he is aware is subject to a fine of up to \$10,000 and imprisonment up to one year under the Federal Act, compared with a fine in like amount or imprisonment for up to two years under the Florida Act. § 1161(b)(4); A 77; § 376.12; A 68-69. A port manager designated for each of the 11 deep water ports in the state is authorized under the Florida Act to board any vessel prior to its entry into port to ascertain seaworthiness of the vessel and presence on board of required containment gear. He has authority in the event of discharge to refuse entry, direct the ship back out to sea, require it to drop anchor, or direct it to a specific dock for deployment of containment gear. § 376.07(c); A 62-63.

Most significantly, the Federal and State Acts interrelate rather than conflict. Implicit in both statutes is cooperation rather than competition. The Federal Act sets the pattern.

The National Contingency Plan authorized in § 1161(c)(1), A 78-79, speaks to *coordination of efforts* toward containment, dispersal, and removal of oil with State and local agencies. Nowhere does it imply that the Federal authorities shall act alone when State-level assistance is available.

In the event of a "marine disaster," § 1161(d), A 80, the Federal Act again speaks to coordinating all public and private efforts.

In the section immediately following, express recognition is given to the fact that actual or threatened discharge of oil will prompt State and local action, § 1161(c), A 80, and that *in addition* to this action, Federal officials may be required to act.

The limitations capped upon negligence liability expressed in § 1161(f), A 81, relate to claims by the United States *alone* for any cleanup costs sustained by its agencies. Nowhere does the Federal Act suggest that the United States alone will suffer cleanup costs at all. Nothing in this section precludes costs or claims on the part of State agencies or private individuals being assessed against the offending vessel owner. Clearly, to the extent cleanup costs are incurred by the State, they need not be assessed by the United States.

Local and regional oil removal contingency plans are contemplated in § 1161(j)(1), A 85, as further recognition of the State-Federal coordination necessary in the context of oil-spill pollution.

A strong indication that Congress did not intend the Federal Act to operate within the exclusive maritime purview is found in § 1161(n), A 87, where an express grant of jurisdiction to district courts is declared. Had Congress considered the Federal Act part of the woof and substance of general maritime law, such jurisdictional statement would hardly have been necessary.

Finally, § 1161(o) expressly disclaims any intention on the part of Congress to preempt the states "from imposing any requirement or liability with respect to the discharge of oil into any waters within such State." A 87. To this, the District Court commented:

It has long been recognized that Congress is powerless to confer on the states authority to legislate within the admiralty jurisdiction (Citations omitted) and we cannot presume that W.Q.I.A. was an attempt to do so. There is nothing in the language of the act which purports to grant

any such legislative authority to the states. The statement that Congress did not intend to preclude state imposed liability for oil pollution simply means that the states are free to enforce pollution control measures that are within their constitutional prerogative. (A 45-46)

For reasons and under authority set out in Part I of this brief, the State of Florida respectfully demurs. First, it is submitted that states already have authority to legislate in the admiralty jurisdiction, *Wilburn Boat Co. v. Firemans Fund Ins. Co.*, 348 U.S. 310 (1955); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960), and did not necessarily depend upon the Federal Act for support of that authority. To conclude that there is no language in the Federal Act purporting to authorize legislation such as the State Act is to either ignore Section (o)(2) altogether or to suggest that Congress didn't mean what it said.

Where there is to be preemption, there must be a collision of inconsistent obligations. In such event, supremacy dictates that state statutes shall give way before their Federal counterparts to the extent of the inconsistency. But the congressional intent must be certain and unequivocal; preemption will not be inferred.

The question is obvious: Where in the Federal Act does Congress state its intention to preempt the field of oil-spill control? Congressional intent is clearly stated, but the result is opposed to preemption, not in favor of it.

Section 1161 (o) is as strong as it is certain. The language requires no detailed analysis as to meaning or import. Legislative history of the section may be found in *U.S. Code Congressional and Administrative News*, May 5, 1970, page 809. Although there is some discussion of other parts of Section 1161, there is no mention found of subsection (o)(2). Apparently Congress was satisfied with the clear and simple statement that the Federal act was never meant to preclude state legislation in the area of marine oil-spill pollution control. If, in their respective acts, states felt called upon to

impose a standard of liability distinct from that appearing in the Federal Act, it is patently clear that Congress did not intend to interfere. The phrase "any requirement or liability" is broad enough to encompass absolute and unlimited liability for those who cause oil-spill pollution.

The danger of massive oil-spill pollution is both a State and Federal problem. The Federal Act provides a regulatory remedy. Where the oil-spill occurs and the affected state refuses to act, or is incapable of action for reason that it happens beyond territorial waters, Federal machinery is thrown into operation under authority of the Act. But where a state is prepared and willing to participate, the Federal Act leaves room for state action. In the not unlikely event that a spill affects more than one state, the Federal role is one of coordinating emergency response by all agencies. The National Contingency Plan speaks to this. The Federal Act is a clarion call to national-state cooperation. It is not an obstruction in the path of states who seek through local legislation to afford recompense to themselves for their costs and a remedy for their citizens who suffer damage as a result of an oil-spill.

To permit the negative lesson of *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920) to frustrate this expression of federalism would be to ignore an opportunity. The District Court determined that *Knickerbocker Ice Co.* was still vital enough to control its interpretation of the Federal Act. This overlooks (a) the limited purpose for which that case was decided, and (b) the strong, logical dissent of Mr. Justice Brandeis in *Washington v. W.C. Dawson & Co.*, 264 U.S. 218, 228-239 (1924). It is respectfully submitted that the Brandeis dissent reaches optimum application in the case *sub judice*. At 264 U.S. 234:

A further assumption is that Congress, which has power to make and to unmake the general maritime law, can have no voice in determining which of its provisions require adaptation to peculiar local needs, and as to which absolute uniformity is an essential of the proper harmony of international and interstate maritime relations. This assump-

tion has no support in reason; and it is inconsistent (at least in principle) with the powers conferred upon Congress in other connections. * * *

Here we are not dealing with workmen's compensation or wrongful death legislation—non-common law statutes which affect, as far as admiralty is concerned, those in privity with matters maritime. Rather, we are dealing with a vast, inter-related scheme of control and abatement of oil-spill pollution. Mr. Justice Brandeis called upon the Court to overrule *Southern Pacific Co. v. Jensen*, *supra*, and *Knickerbocker Ice Co.* If these cases are still strong enough outside the arena of their facts to defy congressional approval of the State's exercise of its police power in the present context, then Florida joins Justice Brandeis' call.

If the Federal Act speaks to substantive maritime law as the District Court assumed, despite clear indications within the Act itself to the contrary, the State Act must be recognized as supplementary to it. Substantive state statutes have been upheld as such. *Great Lakes Dredge & Dock Co. v. Kierejewski*, 261 U.S. 479 (1922); *Western Fuel Co. v. Garcia*, 257 U.S. 233 (1921). This, too, is an expression of federalism.

(2.)

If Federalism is more than an academic theory,
it requires expression in the
instant case.

Article III, Section 2, implemented under authority of Article I, Section 8, United States Constitution, in the Judiciary Act of 1789, 28 U.S.C. 1333, describes an important federalism in the judicial development of the Union. In extending exclusive jurisdiction of District Courts to admiralty while saving to suitors common law remedies, a dual system is visited upon development of the law maritime. Individual states and the United States are assigned certain areas of concurrent responsibility: jurisdiction of courts and arenas for legislation. *The Hamilton*, 207 U.S. 398 (1907).

Where, in certain provinces of admiralty concurrent action might lead to confusion and impede continuing development of the maritime law, Congress may act with characteristic supremacy to "occupy" a specific area of the field. Where Congress does not act, the states are competent to move. Even on subjects that Congress has reached, states may supplement the substantive effect. Assuming *arguendo* that the combined national-state effort to combat oil pollution or surrounding waters lies within the arena of admiralty cognizance, the State Act is nonetheless valid, for reason that it is not inconsistent with the Federal Act, but supplements that Act (and, in a real sense, makes it workable).

It is difficult to consider Federalism outside of its historical perspective. Its history describes a classic "pendulum" effect. From de Toqueville's confident prediction of the decline of federal power and "a lively sense of independence" on the part of the states in 1835, 1 de Toqueville, *DEMOCRACY IN AMERICA* 414-415 (Bradley ed. 1945), to the observation of Bryce at the end of the 19th Century that, while a state began as a self-sufficient commonwealth, it is "now merely a part of a far grander whole, which seems to be slowly absorbing its functions and stunting its growth," 1 Bryce, *THE AMERICAN COMMONWEALTH* 562, (3rd ed. 1893), the arc of the pendulum is easily followed.

Federalism had its beginning, probably, before the Revolution. Great Britain's colonies were accustomed to sustaining themselves and handling their own affairs of domestic legislation and administration. This sense of local autonomy led to continuing conflict between the individual colonies and the mother country and between the colonies themselves. The style of what would become known as "states' rights" was set early. Schmidhauser, *"States' Rights" and the Origin of the Supreme Court's Power as Arbiter in Federal-State Relations*, 4 Wayne L. Rev 101 (Spring 1958).

One of the central issues of the Constitutional Convention was confederation vs. federalism. On April 8, 1787, James Madison wrote Governor Edmund Randolph of Virginia: "I hold it for a fundamental point, that an individual indepen-

dence of the States is utterly irreconcilable with the idea of an aggregate sovereignty. I think, at the same time, that a consolidation of the States into one simple republic is not less attainable than it would be inexpedient. Let it be tried then whether any middle ground can be taken..." 2 THE WRITINGS OF JAMES MADISON, 337, 338, (Hunt ed. 1901).

The "middle ground" speculated upon by Madison became known as the Connecticut Compromise at the Convention. It provided for equal representation in the Senate, thereby preserving a small but important sovereignty to the states. See, 1 Farrand, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 161 (Rev. ed. 1937); Mason, THE STATES RIGHTS DEBATE 35-36 (1964). Prevalent fears that the Supremacy Clause and constitutional ratification by the people instead of state assemblies would result in swift abolition of all states' rights should have been assuaged by general wording of the Constitution rather than specific clauses. The Constitution presumes continued existence and functions of the states, from provisions for state approval of proposed amendments to the guaranty to each state of a republican form of government. Nonetheless fears mounted, prompting a storm of controversy. Jefferson finally persuaded Madison to introduce amendments during the First Congress. The ensuing campaign to secure state and individual rights was both a success and a failure to amendment sponsors. Sweeping declarations of individual freedom were won, but a clear-cut line of demarcation between state and Federal authority never materialized. What did result, from this effort, however, was the Tenth Amendment (A 94). See, also, Mason, *The Supreme Court and Federalism*, 44 Texas L. Rev. 1187 (1966). It has been the fulcrum of the federalism controversy ever since.

The Tenth Amendment was early deemed to be no more than a pacifier to quiet "the excessive jealousies which had been excited." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 159, 199 (1819). Chief Justice Marshall's pro-Federal ideas were probably necessary at the time, when a post-Revolutionary "back-lash" whipped across the states. Thus, he

reasoned, the sovereign character of the states underwent a change when they converted their league into a government; and because of the Supremacy Clause, their previous character would never be the same. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 82-92 (1824).

This position drew equally strong protest. Protest was loudest where hull-plates of the ship of state were weakest. Four years after *Gibbons v. Ogden*, pressure was mounting in South Carolina. "That argument cannot be sound which necessarily converts a government of enumerated into one of indefinite powers, and a confederacy of republics into a gigantic and consolidated empire." 2 WRITINGS OF HUGH SWINTON LEGARE 102 (1845).

In 1835, the pendulum abruptly swung the other way. Roger Taney began a 30-year tenure as Chief Justice, and opinions of the Court redefined federalism in terms more favorable to the states, i.e., *The License Cases*, 46 U.S. (5 How.) 590, 671 (1846), *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856). The Civil War changed stroke. Appomatox, together with the Thirteenth, Fourteenth, and Fifteenth Amendments, effectively overruled Chief Justice Taney. *Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1872). But adherents to the concept of states' rights gradually rebuilt their position, and in 1918, the Court inserted the word "expressly" before "delegated" in the Tenth Amendment to place manufacturing, agriculture, and labor relations beyond Federal control. *Hammer v. Dagenhart*, 247 U.S. 251 (1918). The tenor of the court is worth noting:

In interpreting the Constitution it must never be forgotten that the Nation is made up of States to which are entrusted the powers of local government. And to them and to the people the powers not *expressly* delegated to the National Government are reserved... 247 U.S. at 275 (emphasis supplied)

Two decades later "expressly" was again read into the Constitution to defeat certain New Deal legislation in a series

of cases, e.g. *United States v. Butler*, 297 U.S. 1 (1935), until Justice Stone, who strongly dissented in the New Deal cases, finally prevailed. In *United States v. Darby Lumber Co.*, 312 U.S. 100, 123 (1940), he observed: "Our conclusion is unaffected by the Tenth Amendment. . . . There is nothing in its adoption to suggest that it was more than declaratory of the relationship between the national and state governments. . . ."

There have been signs, recently, that the Tenth Amendment has taken on somewhat broader significance to the Court and to Congress. In the maritime area, "uniformity" is a euphemism for Federal hegemony. The plateau of case law in this respect reached its peak with *Jensen, Knickerbocker Ice*, and *Washington v. W. C. Dawson & Co.* 264 U.S. 218 (1924). It is submitted that this trend can go no further without judicially rewriting Article III, Section 2, by inserting "exclusively" before "extend," and ignoring the Judiciary Act altogether. Thus, in *Just v. Chambers*, 312 U.S. 383 (1941), and *Standard Dredging Corp. v. Murphy*, 319 U.S. 306 (1943), uniformity as a standard for measuring state legislation, i.e., imposition of Federal values on state substantive statutes, became considerably less than a categorical imperative.

More recently, the Court enumerated the wide range of areas left open to the States in *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373-374 (1959), noting that:

[T]o claim that all enforced rights pertaining to matters maritime are rooted in federal law is a destructive oversimplification of the highly intricate interplay of the States and the National Government in their regulation of maritime commerce. . . . [I]f one thing is clear it is that the source of law in saving-clause actions cannot be described in absolute terms. Maritime law is not a monistic system. The State and Federal Governments jointly exert regulatory powers today as they have played joint roles in the development of maritime law throughout our history.

In *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), and *Chevron Oil Co. v. Huson*, U.S. , 30 L.Ed.2d 296 (1971), State-Federal team work and joint responsibility for providing legal remedies under the Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C. §§ 1331 *et seq.*, is recognized. No challenge of Congress' power to apply state substantive law is tolerated by either case. For analogous reasons, no challenge of Congress' power to conceive and effect a joint effort for oil pollution control should be tolerated here.

(3.)

The "gap theory" of State law filling gaps in Federal statutory schemes is alive and well in *Rodrigue*.

The State of Florida argued in the District Court that the scheme described in the Federal Act left intentional loopholes or "gaps" to be filled-in by state legislation in order to accomplish congressional intent. The District Court dismissed this argument on authority of *Moragne v. State Marine Lines, Inc.*, 398 U.S. 375 (1970), which, according to the District Court (A 44) "clearly puts such a theory to rest."

In reaching such conclusion, the District Court overlooked the lesson of *Rodrigue v. Aetna Casualty & Surety Co.*, *supra*, where a Federal Act incorporated state substantive statutes by reference and adopted them as federal law. "[L]anguage [of the House Conference Report] makes it clear that state law could be used to fill federal voids." 395 U.S. at 358.

This concept was commented on shortly thereafter in *Chevron Oil Co. v. Huson*, *supra*, where it was noted that in *Rodrigue* the Court clarified the scope of application of federal law and state law under the Lands Act, 43 U.S.C. § 1333, and "[b]y rejecting the view that comprehensive admiralty law remedies apply under § 1333(a)(1), we recognize that there exists a substantial "gap" in federal law. Thus state law remedies are not "inconsistent" with applicable

federal law. Accordingly we held that, in order to provide a remedy for wrongful death, the "gap" must be filled with the applicable body of state law under § 1333(a)(2)." 30 L.Ed.2d 296 at 302.

The Court also noted at 30 L.Ed.2d 304 that in the Lands Act Congress had specifically rejected uniformity and provided for application of state remedies. This is no less true of the Federal Act in the case *sub judice*.

The Florida Act speaks to local action in coordination with National action. It fills "gaps" in execution of the contingency plan, and in providing remedies for (a) state cleanup claims and (b) private party damage claims. Moreover, there is a strong indication in the Federal Act that it is not part of the general body of maritime law at all.

In denying Florida's "gap" theory interpretation of the State Act on the basis of the Court's holding in *Moragne v. States Marine Lines, Inc.*, *supra*, the District Court was in error. The "gap" theory is an integral part of Congress' expression of federalism in the Federal Act. It has a place in our jurisprudence, and a secure place in this case.

CONCLUSION

For reasons and under authority set forth above, this Court is requested to reverse the District Court judgment and declare the Florida Act to be a valid expression of the police power of the State, and a valid response to the congressional policy for combatting oil pollution of coastal waters of the United States and the State of Florida.

Respectfully submitted,

ROBERT L. SHEVIN
Attorney General

DANIEL S. DEARING
Chief Trial Counsel
Department of Legal Affairs
State of Florida
The Capitol
Tallahassee, Florida

Attorneys for Appellant

COPY

Supreme Court, U. S.
FILED

JUN 15 1972

MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

Otober Term, 1971

No. 71-1082

REUBIN O'D. ASKEW, ET AL.,
vs. *Appellants*

THE AMERICAN WATERWAYS
OPERATORS, INC., ET AL.,
Appellees

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
MIDDLE DISTRICT OF FLORIDA

BRIEF OF THE STATE OF TEXAS AS
AMICUS CURIAE

CRAWFORD C. MARTIN
Attorney General of Texas

NOLA WHITE
First Assistant

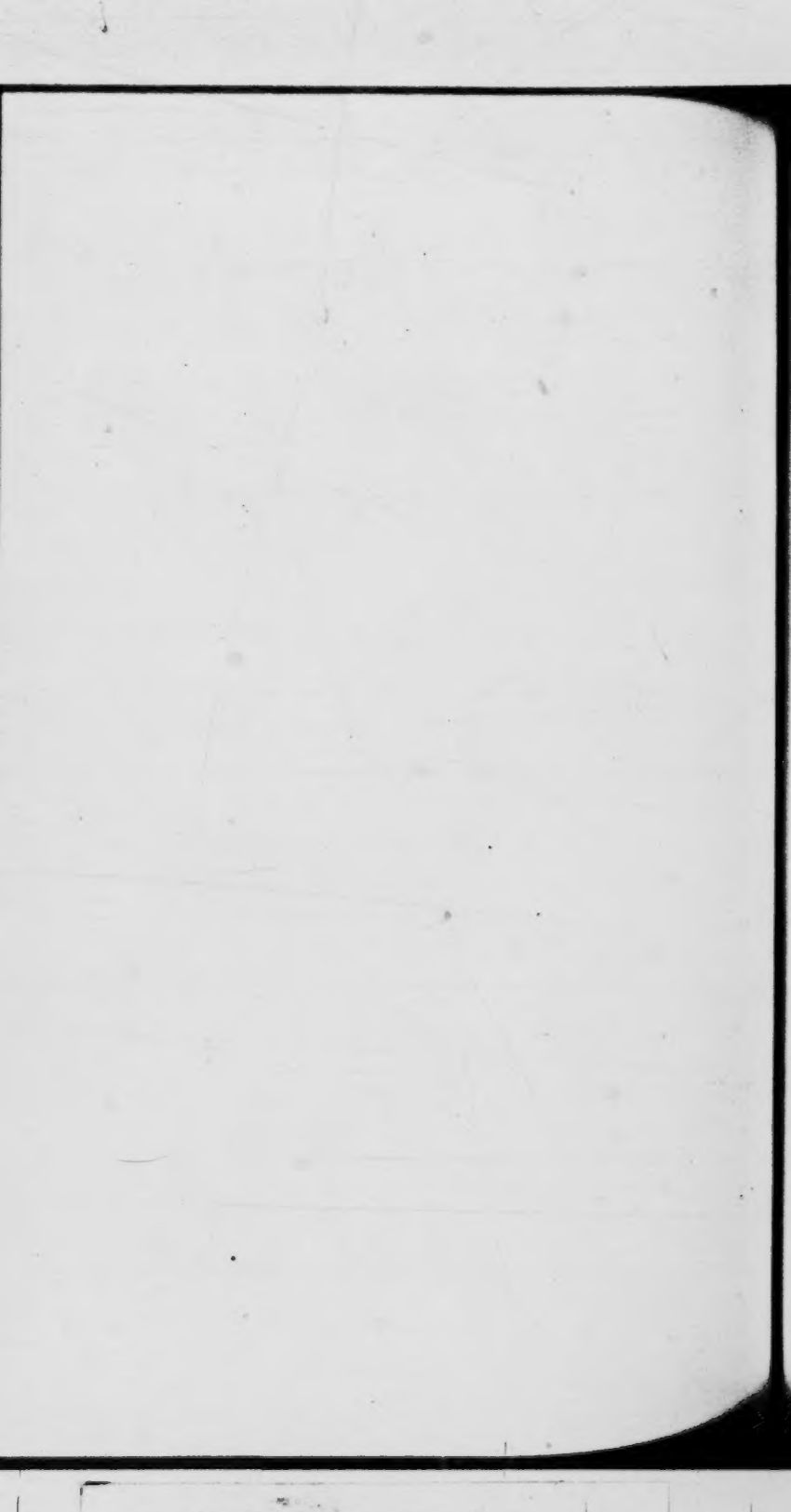
ALFRED WALKER
Executive Assistant

HOUGHTON BROWNLEE, JR.
Assistant Attorney General

JOHN MILTON RICHARDSON
Assistant Attorney General

*Attorneys for Amicus Curiae
The State of Texas*

Box 12548, Capitol Station
Austin, Texas 78711



IN THE
SUPREME COURT OF THE UNITED STATES

Otober Term, 1971

No. 71-1082

REUBIN O'D. ASKEW, ET AL.,
Appellants

vs.

THE AMERICAN WATERWAYS
OPERATORS, INC., ET AL.,
Appellees

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
MIDDLE DISTRICT OF FLORIDA

BRIEF OF THE STATE OF TEXAS AS
AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The State of Texas has a coastline on the Gulf of Mexico of about 374 miles and a shoreline of about 1,000 miles on the bays and inlets of the Gulf of Mexico. The State of Texas owns 2,888,000 acres of land in its territorial waters in the Gulf of Mexico and 1,516,970 acres of land in its bays and inlets adjoining the Gulf of Mexico. (Figures from the General Land Office of Texas.)

Three major industries of the coastal area of Texas are tourist and recreational, fishing, and oil and gas. The value of the out-of-state automobile tourist busi-

ness to the coastal area of the State of Texas alone was over \$326,000,000 in 1971 (Texas Visitor Industry, 1971, compiled and published by Texas Highway Department, Travel and Information Division). The value of commercial landings of fish in Texas ports for 1971 was over \$70,037,000 (Fisheries of the United States, 1971, Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service). The monthly value from oil and gas royalties payable to the State of Texas is approximately \$900,000 from bay production and \$200,000 from Gulf of Mexico production (Figures from General Land Office).

Because of the State of Texas' concern with the protection and preservation of its coastal waters, and the health and welfare of its people who live not only in proximity to them but also who live in the rest of the State and depend upon the Texas coastal region for recreation and sustenance, the State of Texas respectfully files this brief as *amicus curiae*.

QUESTIONS PRESENTED

The State of Texas adopts the Questions Presented in the brief of the State of Georgia as *amicus curiae*.

ARGUMENT

The State of Texas adopts the argument contained in the brief of the State of Georgia as *amicus curiae*.

CONCLUSION

The State of Texas prays the Court to grant the relief prayed for by the State of Florida in its brief.

Respectfully submitted,

CRAWFORD C. MARTIN
Attorney General of Texas

NOLA WHITE
First Assistant

ALFRED WALKER
Executive Assistant

HOUGHTON BROWNLEE, JR.
Assistant Attorney General

John Milton Richardson

JOHN MILTON RICHARDSON
Assistant Attorney General

*Attorneys for Amicus Curiae
The State of Texas*

Box 12548, Capitol Station
Austin, Texas 78711

COPY

Supreme Court, U. S.
FILED

JUN 15 1972

IN THE
Supreme Court of the United States
OCTOBER TERM, 1972

STENTON, JR., CLERK

No. 71-1082

REUBIN O'D. ASKEW, et al.,

Appellants,

v.

**THE AMERICAN WATERWAYS
OPERATORS, INC., et al.,**

Appellees.

**On Appeal from the United States District Court
for the Middle District of Florida**

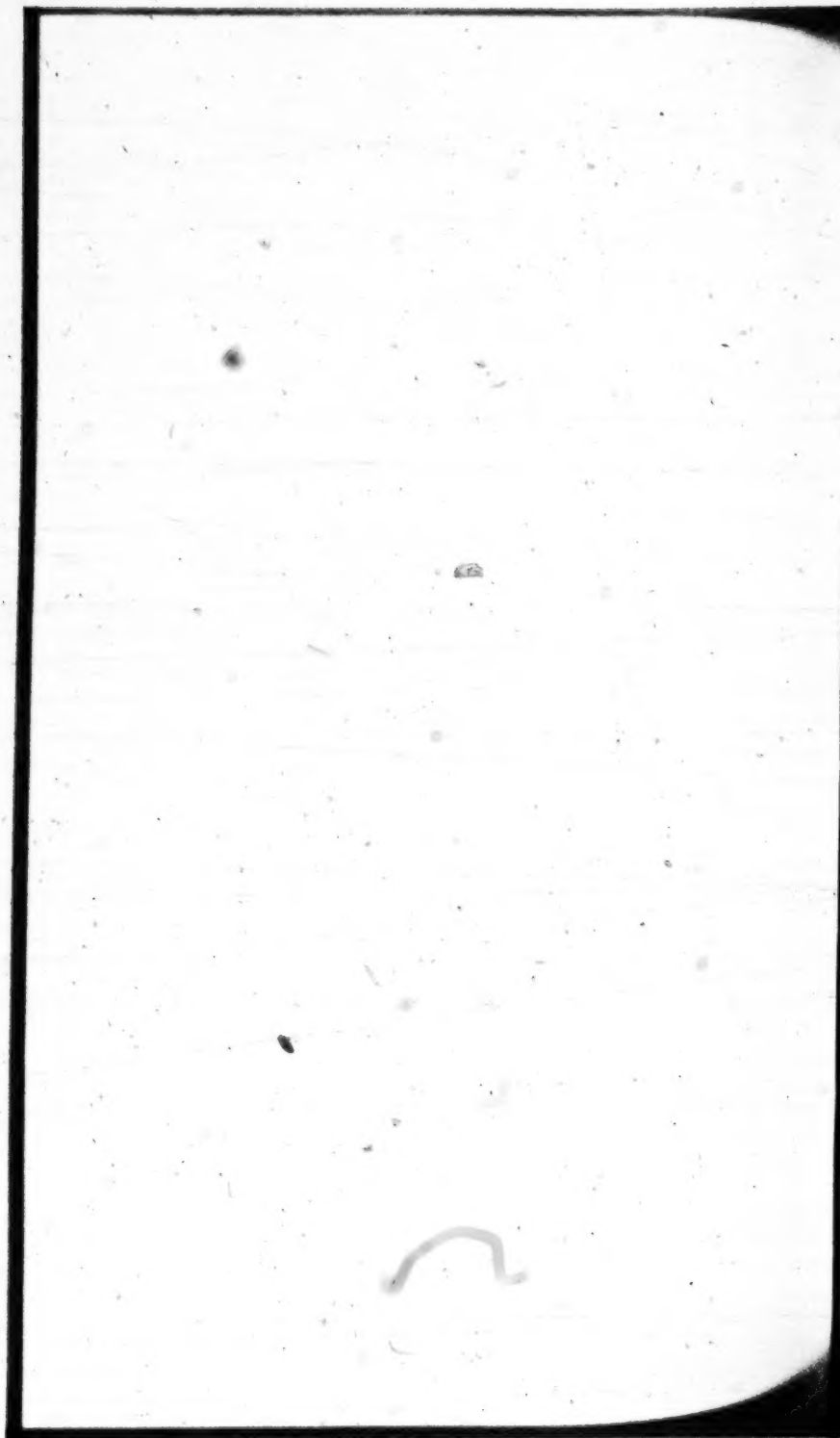
**BRIEF OF THE STATE OF HAWAII
AS AMICUS CURIAE**

GEORGE PAI
Attorney General

NOBUKI KAMIDA
Deputy Attorney General

ALAN M. GODA
Deputy Attorney General

STATE OF HAWAII
Hawaii State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813



BLEED THROUGH POOR COPY

IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1082

REUBIN O'D. ASKEW, et al.,

Appellants,

v.

THE AMERICAN WATERWAYS
OPERATORS, INC., et al.,

Appellees.

On Appeal from the United States District Court
for the Middle District of Florida

BRIEF OF THE STATE OF HAWAII
AS AMICUS CURIAE

OPINION BELOW

The opinion of the district court is reported in *The American Waterways Operators, Inc. v. Askew*, 335 F. Supp. 1241 (M.D. Fla. 1971).

JURISDICTION

The judgment of the district court was entered on December 10, 1971, and the Notice of Appeal was filed on December 23, 1971. The court noted probable jurisdiction on April 17, 1972. 40 L.W. 3503. Jurisdiction rests upon 28 USC §1253, this being an appeal from the judgment of a three-judge district court holding Florida's "Oil Spill Prevention and Pollution Control Act of 1970" to be invalid under Article III, Section 2, Ch. 1 of the United States Constitution.

INTEREST OF THE STATE OF HAWAII

The State of Hawaii, by its unique location and related activities, has long been vitally concerned with preserving and safeguarding its shoreline and surrounding waters. It has long been called an Island Paradise and its excellent climate, beautiful beaches and rugged shoreline have long attracted citizens of other states and of many nations to visit our State.

The tourist industry, which includes sport fishing, bathing, boating and other related activities has become the second leading industry in the State and provides jobs to many thousands of Hawaii's people. These activities all depend upon the favorable and almost pristine conditions of Hawaii's waters, beaches, and shoreline.

However, the consequences of pollution in the form of oil spills or similar contaminating discharges upon the State's offshore waters is not limited simply to the loss of tourists who might refuse to come to Hawaii and recline on beaches which ooze oil. Of vital concern is the peril to the State's countless bays, inlets, lagoons, estuaries, and other non-navigable waters which serve as breeding and spawning grounds to a multitude of aquatic and marine organisms. It is these very organisms which serve as the basis for Hawaii's fishing industry and other industries which depend upon such marine life.

Furthermore, Hawaii has long dreamed of establishing itself as a leader in the ocean sciences. Over the years the State's

superb marine endowments have attracted a host of ocean-oriented scientists bent on making Hawaii an international center of marine activity. The State already boasts of at least two renowned centers for ocean research, Makai Range and the Oceanic Institute. These research centers together with other centers established in Hawaii can study and learn about the ocean, beaches, estuaries, shoreline, and the various marine organisms which inhabit these areas for the benefit of people around the world. Oil spillages, even minor ones, could destroy years of research effort and deprive us of needed information.

In view of the importance ascribed to possible oil pollution in Hawaii, the legislature of this State has proposed Senate Bill 901 which relates to Oil Pollution Control. This bill contains provisions similar to the Florida "Oil Spill Prevention and Pollution Control Act of 1970" and is designed to protect the State's beaches, estuaries, public lands and coastal waters and preserve them in as close to a pristine condition as possible. It was therefore with grave concern that the State received the three-judge district court decision in *The American Waterways Operators, Inc. v. Askew*, 335 F. Supp. 1241 (M.D. Fla. 1971) which struck down the Florida statute as an "unlawful intrusion into the exclusive federal admiralty domain." 335 F. Supp. at 1246.

Hawaii, therefore, has considerable interest in ascertaining the extent of the federal maritime jurisdiction into these areas and whether any such jurisdiction wholly precludes a State from protecting and preserving its property and the health and well-being of its citizens from ocean or water-borne pollution.

ARGUMENT

The State of Hawaii adopts the questions presented, the Statement of the Facts and the Arguments which are presented to this Honorable Supreme Court by the Brief for the State of Georgia as Amicus Curiae.

CONCLUSION

The case at bar is of great significance to the rights of the various coastal states to legislate in the area of water pollution to protect their beaches, estuaries, coastline and coastal waters from the deleterious effects of oil spills and other contaminants and enhance the economic and physical well-being of its citizens. For the reasons stated above, we believe the opinion of the court below is erroneous and respectfully submit that its decision should be reversed.

DATED: Honolulu, Hawaii, June 13, 1972.

Respectfully submitted,

GEORGE PAI
Attorney General
State of Hawaii

By *Nobuki Kamida*

NOBUKI KAMIDA
Deputy Attorney General
State of Hawaii

and

ALAN M. GODA
Deputy Attorney General
State of Hawaii
Hawaii State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Attorneys for Amicus Curiae

PROOF OF SERVICE

I, Nobuki Kamida, hereby certify that on the 13th day of June, 1972, I served three copies of the above Brief for the State of Hawaii as Amicus Curiae on the several parties hereto as follows:

Attorneys for Original Plaintiffs-Appellees
Ervin, Pennington, Varn & Jacobs
P. O. Box 1170
Tallahassee, Florida 32302

Attorneys for Intervening Plaintiffs-Appellees
Kurz, Toole, Taylor, Moseley & Gabel
Suite 1014
Barnett Bank Building
112 West Adam Street
Jacksonville, Florida 32202

Fowler, White, Gillen, Humkey,
Kinney & Boggs
P. O. Box 1438
Tampa, Florida 33601

Haight, Gardner, Poor & Havens
80 Broad Street
New York, New York 10004

Healy & Baillie
29 Broadway
New York, New York 10006

Attorney for Defendants-Appellants
Honorable Robert L. Shevin
Attorney General
The Capitol
Tallahassee, Florida 32304

Attorneys for Amicus Curiae
Honorable William J. Baxley
Attorney General
State Administration Building
Montgomery, Alabama 36104

Honorable Evelle J. Younger
Attorney General
600 State Building
Los Angeles, California 90012

Honorable Robert K. Killian
Attorney General
30 Trinity Street
Hartford, Connecticut

Honorable W. Laird Stabler, Jr.
Attorney General
Department of Justice
Wilmington, Delaware 19801

Honorable Arthur K. Bolton
Attorney General
132 State Judicial Building
Atlanta, Georgia 30334

Honorable Robert Morgan
Attorney General
P. O. Box 629
Raleigh, North Carolina 27602

Honorable Jack P. F. Gremillion
Attorney General
P. O. Box 44005
Baton Rouge, Louisiana 70804

Honorable Louis J. Lefkowitz
Attorney General
State Capitol
Albany, New York 12225

Honorable Lee Johnson
Attorney General
322 State Office Building
Salem, Oregon 97310

Honorable Andrew P. Miller
Attorney General
Supreme Court - Library Building
Richmond, Virginia 23219

by air mail postage prepaid, at the United States Post Office at
Honolulu, Hawaii.

Nobuki Kamida

Nobuki Kamida
Deputy Attorney General

FILE COPY

Supreme Court, U.
FILED

**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971**

JUN 16 1972

MICHAEL RODAK, JR., C

No. 1082

**REUBIN O'D. ASKEW, et al.,
Appellants,**

vs.

**THE AMERICAN WATERWAYS
OPERATORS, INC., et al.,
Appellees.**

**On Appeal from the District Court of the United States
for the Middle District of Florida**

**BRIEF OF THE STATE OF MICHIGAN AS AMICUS
CURIAE IN SUPPORT OF REVERSAL**

FRANK J. KELLEY
Attorney General of the
State of Michigan

Robert A. Derengoski
Solicitor General

Hugh B. Anderson
Assistant Attorney General

Charles S. Alpert
Assistant Attorney General

Seven Story Office Building
525 West Ottawa Street
Lansing, Michigan 48913
Tel: (517) 373-1110

Dated: June 15, 1972



TABLE OF CONTENTS

Interest of Amicus	1
Argument	4
I. A COMPREHENSIVE LEGISLATIVE SCHEME WHICH PLACES THE COST OF REMOVING AND PREVENTING OIL DISCHARGES SQUARELY ON THE POL- LUTER MAXIMIZES THE EFFECTIVE- NESS OF POLLUTION LAWS AND IS RESPONSIVE TO PUBLIC POLICY	4
II. THE FLORIDA STATUTE HERE IN- VOLVED DOES NOT CONFLICT WITH EITHER THE WATER QUALITY IM- PROVEMENT ACT OF 1970 OR WITH MARITIME LAW	7
Conclusion	9
Appendix	11

AUTHORITIES CITED

CASES:

Southern Pacific Co. v. Jensen, 244 US 205 (1917)

STATUTES:

Michigan

Water Pollution Control Act of 1970,
MCLA 323.331 et seq; MSA 3.533(201) et seq2, 3, 6

Florida

Florida Oil Spill Prevention and Pollution
Control Act of 1970, Fla Stat Ann Sec. 376
(Supp 1971-72) 7, 8

Fla Stat Ann 371.52 (Supp 1971-72) 6

Federal

Water Quality Improvement Act of 1970,
33 USC 1161 et seq 7

SECONDARY SOURCES

Newspapers and Magazines

Newsweek, February 17, 1969, p. 33,
June 16, 1969, p. 60 4

The Detroit News, June 5, 1972, p. 1 5

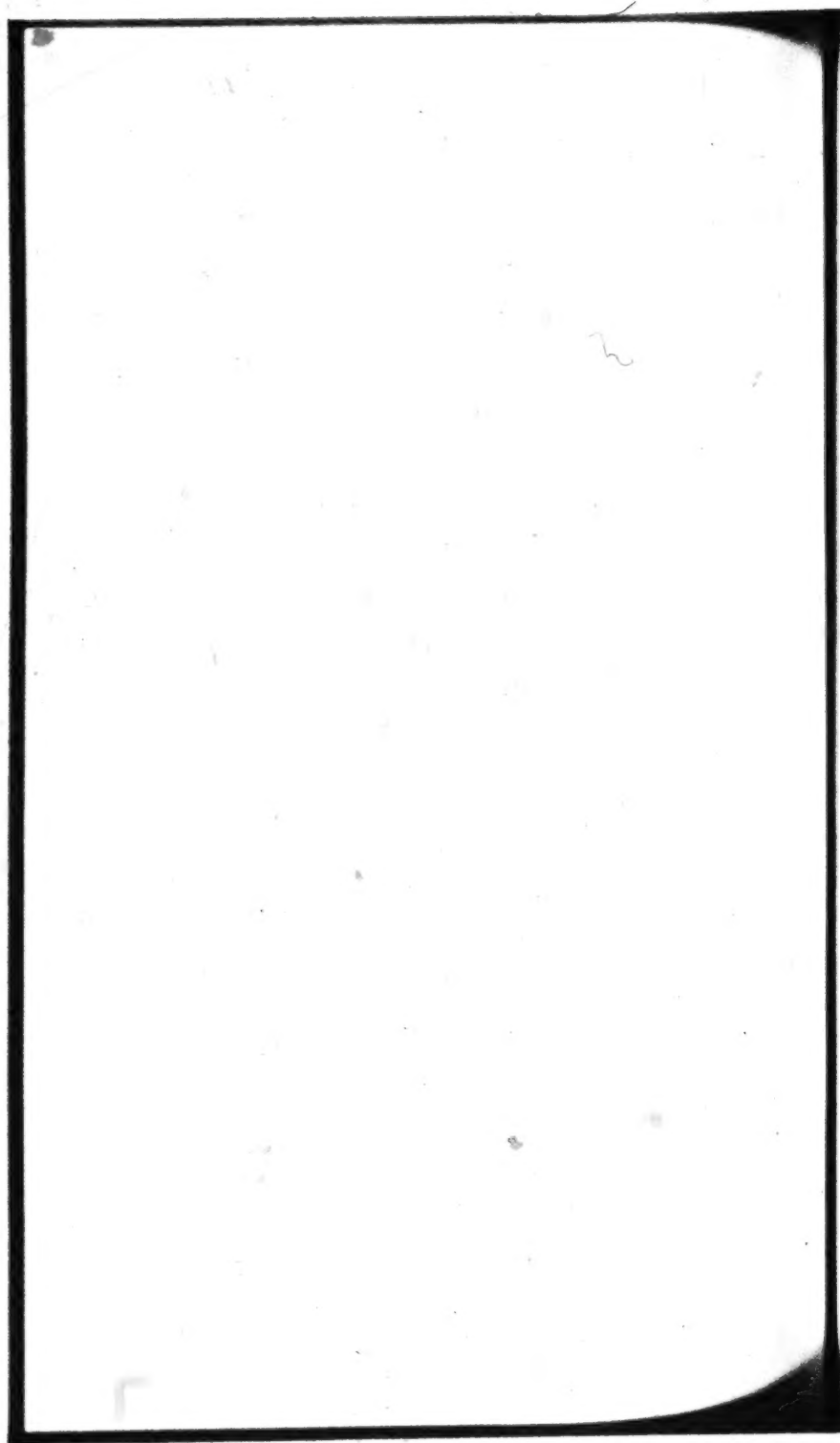
The Detroit Free Press, June 6, 1972, p. 1 5

LAW REVIEWS

McCoy, "Oil Spill Control,"
40 Geo Wash L Rev 97, 106 (1971) 6

BOOKS

Encyclopedia Americana, Vol XIX, p. 18 (1960) —	2
Gilmore and Black, The Law of Admiralty, 119, 283 —————	8
Greenwood's Guide to Great Lake Shippers, (April, 1972) —————	5
Ludwigson, Oil Pollution at Sea, Oil Pollution: Problems and Policies, 13 —————	4
Michigan Manual, 1971-72, p. 1 —————	2



**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971**

No. 1082

**REUBIN O'D. ASKEW, et al.,
Appellants,**

vs.

**THE AMERICAN WATERWAYS
OPERATORS, INC., et al.,
Appellees.**

**On Appeal from the District Court of the United States
for the Middle District of Florida**

**BRIEF OF THE STATE OF MICHIGAN AS AMICUS
CURIAE IN SUPPORT OF REVERSAL**

INTEREST OF AMICUS

The name "Michigan" is a simplification of Indian syllables which together mean "monstrous lake" or "vast body of water." Indeed, Michigan abounds with water resources; it is truly a "water wonderland". The State of Michigan has 3,177 miles of shoreline, more than any other state in the Union, except Alaska. Additionally, Michigan covers 38,575 square miles of the Great Lakes. Within the state, there are 11,037 inland lakes. The length of the courses of major rivers in Michigan is 5,499 miles; in addi-

tion, there are an estimated 30,000 miles of tributaries. Michigan, then, is truly a "monstrous lake".[1]

Because of the unique water resources which Michigan possesses, Michigan has long been a leader in the enactment of legislation designed to protect natural water resources from pollution. For example, Michigan has enacted the Water Pollution Control Act of 1970, being MCLA 323.331 et seq. and MSA 3.533 (201) et seq., which has as one of its objectives the regulation of the disposal of oil and sewage from watercraft.[2]

One of the key provisions of the Water Pollution Control Act of 1970 is section seven of the Act.[3] Section seven reads as follows:

"Sec. 7. (1) A person owning, operating or otherwise concerned in the operation, navigation or management of a watercraft operating on the waters of this state shall not discharge or permit the discharge of oil or oily wastes from the watercraft into or onto the waters of this state if the oil or oily wastes threaten to pollute or contribute to the pollution of the waters or adjoining shorelines or beaches.

(2) The owner or operator of any watercraft who, whether directly or through any person concerned in the operation, navigation or management of the watercraft, discharges or permits or causes or contributes

[1]

See, *Encyclopedia Americana*, Vol XIX, p 18 (1960) and *Michigan Manual*, 1971-72, p 1.

[2]

A complete copy of the text of the Michigan Water Pollution Control Act of 1970 is set out as an appendix to this Brief.

[3]

MCLA 323.337; MSA 3.533 (207).

to the discharge of oil or oily wastes into or onto the waters of this state or adjoining shorelines or beaches shall immediately remove the oil or oily wastes from the waters, shorelines or beaches. *If the state removes the oil or oily wastes which were discharged by an owner or operator, the watercraft and the owner or operator are liable to the state for the full amount of the costs reasonably incurred for its removal.* The state may bring action against the owner or operator to recover such costs in any court of competent jurisdiction."

[MCLA 323.337; MSA 3.533 (207), emphasis supplied.]

This provision which became effective January 1, 1971 represents one of the most important steps taken by the State of Michigan in the continuing struggle against the pollution of our lakes, streams, and rivers.

Because of Michigan's vital concern with the preservation and protection of its vast water resources and because of points of similarity between the Florida statute under review in this case and the Michigan Water Pollution Control Act in terms of oils spills, we view the outcome of this litigation with deep concern. We are convinced that the ruling of the United States District Court for the Middle District of Florida, if upheld by this Court, would have a very damaging effect on the efforts of the State of Michigan to regulate oil discharges into its waters and to place the cost of removing these discharges on the polluter.

The State of Michigan, therefore, respectfully files this brief as amicus curiae pursuant to Rule 42 of the Revised Rules of this Court.

ARGUMENT

I

A COMPREHENSIVE LEGISLATIVE SCHEME WHICH PLACES THE COST OF REMOVING AND PREVENTING OIL DISCHARGES SQUARELY ON THE POLLUTER MAXIMIZES THE EFFECTIVENESS OF POLLUTION LAWS AND IS RESPONSIVE TO PUBLIC POLICY.

Oil pollution is one of the most highly visible and aesthetically appalling forms of water pollution. Furthermore, the ugly spector of oil pollution manifests itself in many diverse forms.

For a state like Florida, two recent technological developments in the oil industry have exacerbated the oil spill problem in recent years. The first technological development is the supertanker. Admittedly, the supertanker can carry large quantities of oil at a low unit cost. The supertanker, however, is very difficult to maneuver and so simply constructed, that when a simple accident takes place, ten or even hundreds of *tons* of oil can escape easily. See, Ludwigson, *Oil Pollution at Sea, Oil Pollution: Problems and Policies*, 13. A second major source of oil pollution is blow-out from undersea oil wells. The most notorious offshore drilling episode began six miles off the coast of Santa Barbara, California on January 28, 1969. Oil bubbled out of control at a rate of 21,000 gallons a day for some 12 days. Even after the plugging of the original leak, hundreds of gallons of oil continued to escape from the seabed. See, *Newsweek*, February 17, 1969, p 33; June 16, 1969, p 60.

Although Michigan does not presently experience the supertanker problem or the blow-out from undersea oil

wells problem, Michigan still faces a serious menace from oil pollution to its waters. There are, for example, an unbelievable 487,099 motor boats presently registered in the State of Michigan;[4] each of these vessels is capable of oil discharge. Furthermore, there are 59 tankers operating on the Great Lakes.[5] Hundreds of other commercial vessels which operate on the Great Lakes, including ocean going tankers, further increases the potential in Michigan for oil discharges.[6] Since the bulk of Michigan's population lives along the shoreline and draws its water supply from the Great Lakes, oil pollution poses a very serious problem to Michigan citizens.[7]

In view of the severity of the oil spill problem and in view of the many ways in which an oil spill may take place, every coastal state must be able to enact a legislative scheme which is tailored to deal with its own particular water pollution ailments. Turning to the Florida situation, it must be

[4]

This figure comes from the official registry which is compiled by the Michigan Department of State.

[5]

See, *Greenwood's Guide to Great Lake Shippers*, (April, 1972).

[6]

Note, *Greenwood's Guide to Great Lake Shippers*, (April, 1972) lists 487 fleet vessels operating in the Great Lakes.

[7]

At the time this brief was being prepared for delivery to the printer, on June 5, 1972, a collision of two steamships occurred in the St. Clair River at Port Huron, Michigan. One of the ships, the "Sydney E. Smith, Inc.", immediately sank to the bottom of the river with 49,000 gallons of "Bunker C" fuel oil. It is unknown at the time of this writing whether this oil will escape into the river; if it does, Coast Guard officials are quoted as saying that it may not be possible to contain the oil, due to fast-moving currents. The resulting damage to Michigan beaches and a wildlife preserve on Harsen's Island could be substantial. *The Detroit News*, June 5, 1972, p 1; *The Detroit Free Press*, June 6, 1972, p 1.

submitted that to approach any meaningful effectiveness, pollution laws must impose liability without fault. The history in Florida is a glaring example of the need for absolute liability. Actually, Florida for several years has had a typical statute imposing liability for negligence only upon operators physically aboard an offending vessel at the time injury or damage occurs. Fla Stat Ann 371.52 (Supp 1971-72). Yet to hold the captain or other crew members of a tanker liable without placing the shipowner under commensurate liability would be futile in serious oil spill cases. Even if an owner could be reached, he would still have numerous maritime defenses available. See, McCoy, "Oil Spill Control," 40 Geo Wash L Rev 97, 106 (1971).

Michigan has also designed its laws to maximize their effectiveness in light of Michigan's own particular pollution problems. The goal of Michigan law is to protect its beaches and waters. Under the Michigan Water Pollution Control Act of 1970, *supra*, the owner or operator of a watercraft is fully liable to the State of Michigan for the amount of costs reasonably incurred by the State in the removal of an oil discharge from the waters and beaches, if the owner or operator does not immediately remove the oil or oily wastes.

Finally, both the Michigan law and the Florida law are in accord with public policy. The citizen pays a heavy price for every disastrous oil spill; this price should not be increased to include the cost of prevention and clean-up. Any oil spill in Florida or Michigan, for instance, brings a serious and substantial potential for havoc to the ecology, to tourist business, and to the health and welfare of the citizens of both states. The cost of polluting, therefore, should be on the polluter and not on the citizen-taxpayer.

II

THE FLORIDA STATUTE HERE INVOLVED DOES NOT CONFLICT WITH EITHER THE WATER QUALITY IMPROVEMENT ACT OF 1970 OR WITH MARITIME LAW.

Neither the Constitution nor any federal statutes preclude States from passing laws which directly affect admiralty matters; indeed, a considerable body of state law in the admiralty area has long existed. See, McCoy, "Oil Spill Control," 40 Geo Wash L Rev 97.102. The only requirement for a state statute in the admiralty area is that it must supplement rather than conflict with general maritime law. See, *Southern Pacific Co v Jensen*, 244 US 205 (1917).

The Florida Oil Spill Prevention and Pollution Control Act of 1970, Fla Stat Ann Sec 376 (Supp 1971-72), is not in conflict with the Water Quality Improvement Act of 1970, 33 USC 1161 et seq. The oil spill provisions of the 1970 Federal Act establish liability only to the federal government and such liability falls between ordinary negligence and liability without fault:

"Except where an owner or operator can prove that a discharge was caused solely by (A) an Act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act of omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, *such owner or operator of any vessel from which oil is discharged in violation of . . . this section shall, notwithstanding any other provision of law, be liable to the United States Government . . .*"

(33 USC 1161 (f), emphasis supplied.)

The Florida act, on the other hand, is designed to compensate the State of Florida on an absolute liability standard. Therefore, the Florida act is merely complimentary rather than in serious conflict with the Water Quality Improvement Act.

The Florida Oil Spill Prevention and Pollution Control Act of 1970 is, furthermore, not in conflict with general maritime law. Traditionally, general maritime law has imposed liability without fault. See, Gilmore and Black, *The Law of Admiralty*, 283. Since the middle ages members of a ship's crew, injured or otherwise incapacitated under specified conditions, have been entitled to "maintenance and cure" without any showing of negligence. See, Gilmore and Black, *The Law of Admiralty*, 119. Furthermore, general maritime law recognizes and imposes absolute liability as indicated, but not specifically with respect to oil pollution. The Florida act merely seeks to fill this gap in the general maritime law.

CONCLUSION

THE DECISION OF THE DISTRICT COURT SHOULD BE REVERSED AND THE FLORIDA OIL SPILL PREVENTION AND POLLUTION CONTROL ACT OF 1970 SHOULD BE DECLARED CONSTITUTIONAL IN ALL RESPECTS.

Respectfully submitted,

FRANK J. KELLEY
Attorney General of the
State of Michigan

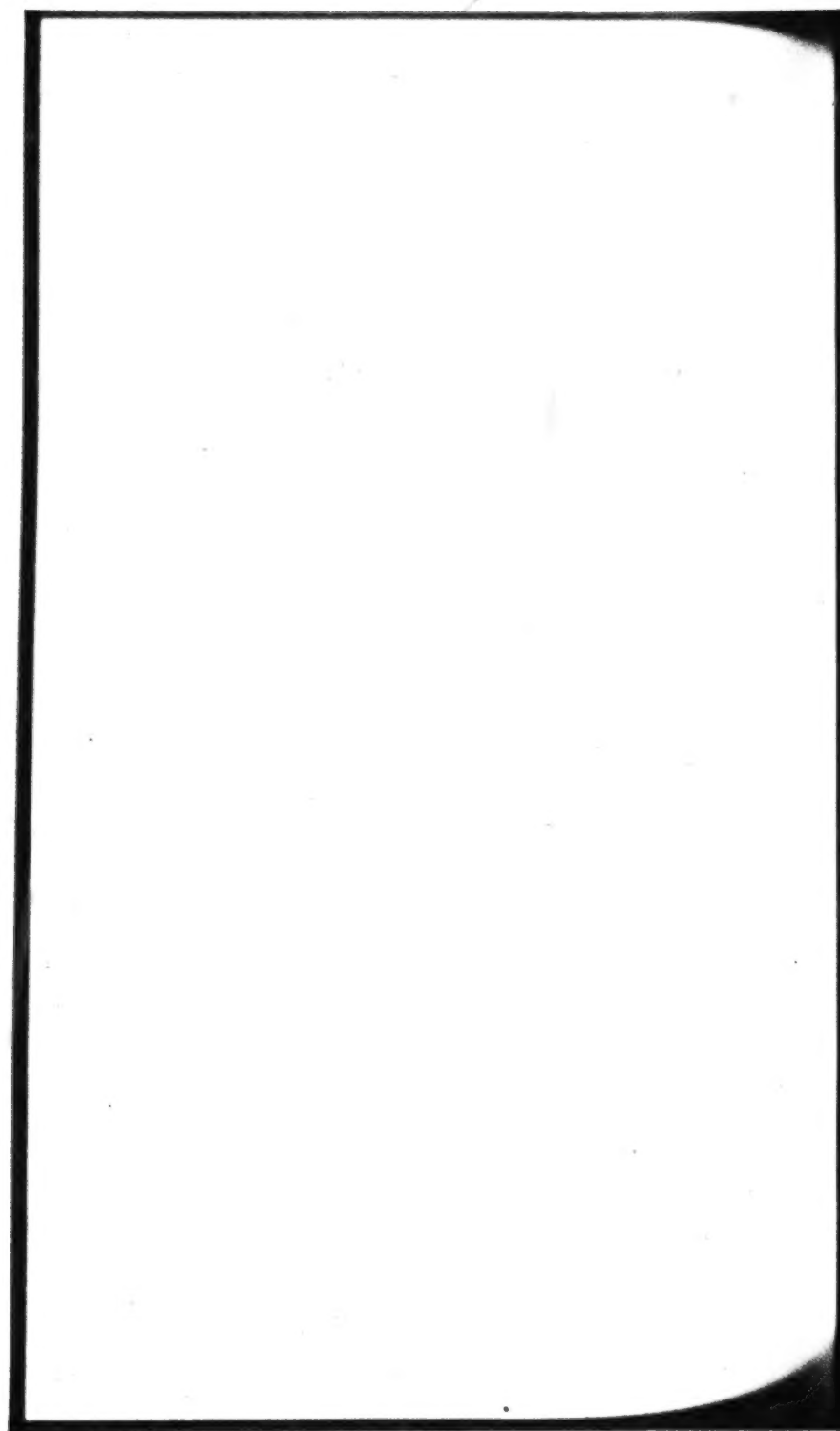
Robert A. Derengoski
Solicitor General

Hugh B. Anderson
Assistant Attorney General

Charles S. Alpert
Assistant Attorney General

Seven Story Office Building
525 West Ottawa Street
Lansing, Michigan 48913
Tel: (517) 373-1110

Dated: June 15, 1972



BLEED THROUGH POOR COPY

COMPILED LAWS ANNOTATED

WATER POLLUTION CONTROL ACT OF 1970 [NEW]

Caption editorially supplied.

P.A. 1970, No. 167, Eff. Jan. 1, 1971

AN ACT to regulate the disposal of oil and sewage from watercraft; and to prohibit littering of waterways.

The People of the State of Michigan enact:

323.331 Short title

Sec. 1. This act shall be known and may be cited as the "watercraft pollution control act of 1970".

P.A. 1970, No. 167, § 1, Eff. Jan. 1, 1971.

P.A. 1970, No. 167, § 12 provided that the act should take effect January 1, 1971. It was ordered to take immediate effect and was approved August 3, 1970.

323.332 Definitions

Sec. 2. As used in this act:

(a) "Act" means Act No. 245 of the Public Acts of 1929, as amended, being sections 323.1 to 323.12a of the Compiled Laws of 1948.

(b) "Commission" means the water resources commission of the department of natural resources.

(c) "Litter" means all rubbish, refuse, waste material, garbage, offal, paper, glass, cans, bottles, trash, debris or other foreign substances of every kind and description.

(d) "Sewage" means all human body wastes, treated or untreated.

(e) "Oil" means oil of any kind or in any form, including but not limited to petroleum, fuel oil, sludge and oil refuse.

(f) "Marine toilet" means any toilet on or within a watercraft used to discharge sewage.

(g) "Watercraft" means any contrivance used or capable of being used for navigation upon water, whether or not capable of self-propulsion, including foreign and domestic vessels engaged in commerce upon the waters of this state, passenger or other cargo-carrying vessels and privately owned recreational watercraft.

(h) "Waters of this state" means all of the waterways on which watercraft may be used or operated including, but not limited to, the Great Lakes and connecting waterways under the jurisdiction of this state.

(i) "Person" means an individual, partnership, firm, corporation, association or other entity.

(j) "Discharge" means any spilling, leaking, pumping, pouring, emitting, emptying or dumping.

P.A. 1970, No. 167, § 2, Eff. Jan. 1, 1971.

323.333 Litter, sewage, oil, garbage, or other materials rendering water unsightly, noxious, or unwholesome; prohibition

Sec. 3. (1) A person shall not place, throw, deposit, discharge or cause to be discharged into or onto the waters of this state, any litter, sewage, oil or other liquid or solid materials which render the water unsightly, noxious or

otherwise unwholesome so as to be detrimental to the public health or welfare or to the enjoyment of the water for recreational purposes.

(2) It is unlawful to discharge, dump, throw or deposit garbage, litter, sewage or oil from a recreational, domestic or foreign watercraft used for pleasure or for the purpose of carrying passengers, cargo or otherwise engaged in commerce on the waters of this state.

P.A. 1970, No. 167, § 3, Eff. Jan. 1, 1971.

323.334 Watercraft, moored or registered in another jurisdiction, pollution control device approved by other jurisdiction; marine toilets, requirements

Sec. 4. (1) Any pleasure or recreational watercraft operated on the waters of this state which is moored or registered in another state or jurisdiction, if equipped with a pollution control device approved by that jurisdiction, may be approved by the commission to operate on the waters of this state.

(2) A person owning, operating or otherwise concerned in the operation, navigation or management of a watercraft having a marine toilet shall not own, use or permit the use of such toilet on the waters of this state unless the toilet is equipped with 1 of the following pollution control devices:

(a) A holding tank or self-contained marine toilet which will retain all sewage produced on the watercraft for subsequent disposal at approved dockside or onshore collection and treatment facilities.

(b) An incinerating device which will reduce to ash all sewage produced on the watercraft. The ash shall be

disposed of onshore in a manner which will preclude pollution.

P.A. 1970, No. 167, § 4, Eff. Jan. 1, 1971.

323.335 Marinas, operating on bottom lands under state lease or permit, pump-out facilities for marine toilets, necessity; noncompliance, effect, notice, hearing

Sec. 5. All marinas operating on the bottomlands of the Great Lakes under lease from the department of natural resources under Act No. 247 of the Public Acts of 1955, as amended, being sections 322.701 to 322.715 of the Compiled Laws of 1948 and all those operating on the bottomlands of inland lakes and streams under permit from the department of natural resources under Act No. 291 of the Public Acts of 1965, as amended, being sections 281.731 to 281.752 of the Compiled Laws of 1948 if selling marine fuel or otherwise providing a dockside service center shall provide pump-out facilities approved by the department of public health for marine toilet holding tanks on pleasure watercraft. Failure to comply with the provisions of this section by any marina owner or operator is just cause for revoking the permit or prohibiting the issuance of a lease for the use of the state's bottomlands. The owner or operator of a marina shall be given written notice and opportunity of hearing before any action is taken.

P.A. 1970, No. 167, § 5, Eff. Jan. 1, 1971.

323.335a Marinas of Michigan waterways commission, pump-out facilities

Sec. 5a. All marinas owned and/or operated or leased by the Michigan waterways commission shall by July 1, 1971 provide pump-out facilities approved by the depart-

ment of public health for marine toilet holding tanks or pleasure and commercial watercraft.

P.A. 1970, No. 167, § 5a, Eff. Jan. 1, 1971.

323.335b Marinas or docks of state or local government, pumping station

Sec. 5b. Any marina or dock which is equipped to handle watercraft of the size capable of being equipped with a marine toilet, owned, leased or operated by the state, any of its departments or agencies or any local unit of government shall maintain a pumping station for pumping out the holding tank required on watercraft.

P.A. 1970, No. 167, § 5b, Eff. Jan. 1, 1971.

323.335c Exempt marinas and docks, pump-out facilities

Sec. 5c. Any marina or dock that holds 15 watercraft or less is exempt from section 5 of this act.^[1]

P.A. 1970, No. 167, § 5c, Eff. Jan. 1, 1971.

323.336 Marine toilets and pollution control devices, boat plate registration application, disclosure of existence; reports as to nonexistence

Sec. 6. An applicant for a boat plate registration for a watercraft pursuant to section 1a of Act No. 70 of the Public Acts of 1911, as amended, being section 207.51a of the Compiled Laws of 1948 shall disclose at such time to the commission whether the watercraft has in or on it a marine toilet, and if so, whether the toilet is equipped with a pollution control device as required by this act. The

[1]

Section 323.335.

commission may request the secretary of state to provide it with the name of registrant whose registration indicates the absence of such pollution control device on a marine toilet.

P.A. 1970, No. 167, § 6, Eff. Jan. 1, 1971.

323.337 Oil or oily wastes, discharge, prohibition; removal; duty; cost of removal by state, persons liable, actions

Sec. 7. (1) A person owning, operating or otherwise concerned in the operation, navigation or management of a watercraft operating on the waters of this state shall not discharge or permit the discharge of oil or oily wastes from the watercraft into or onto the waters of this state if the oil or oily wastes threaten to pollute or contribute to the pollution of the waters or adjoining shorelines or beaches.

(2) The owner or operator of any watercraft who, whether directly or through any person concerned in the operation, navigation or management of the watercraft, discharges or permits or causes or contributes to the discharge of oil or oily wastes into or onto the waters of this state or adjoining shorelines or beaches shall immediately remove the oil or oily wastes from the waters, shorelines or beaches. If the state removes the oil or oily wastes which were discharged by an owner or operator, the watercraft and the owner or operator are liable to the state for the full amount of the costs reasonably incurred for its removal. The state may bring action against the owner or operator to recover such costs in any court of competent jurisdiction.

P.A. 1970, No. 167, § 7, Eff. Jan. 1, 1971.

323.338 Inspection of watercraft and waterside facilities; commercial docks and wharfs, facilities required to prevent pollution

Sec. 8. All watercraft moored, operated or located upon the waters of this state are subject to inspection by the commission, any lawfully designated agent or inspector thereof or any peace, conservation or police officer for the purpose of determining if the watercraft is equipped in compliance with the requirements of this act. The commission may inspect marinas and other waterside facilities used by watercraft for launching, docking or mooring purposes to determine if they are equipped with trash receptacles, sewage disposal equipment or both. Commercial docks and wharfs designed for receiving and loading cargo and/or freight from commercial watercraft must furnish facilities, if determined necessary, as prescribed by the commission, to accommodate discharge of sewage from heads and galleys, and for deposit of litter, garbage, trash, or bilge waters from the watercraft which utilize the docks or wharfs.

P.A.1970, No. 167, § 8, Eff. Jan. 1, 1971.

323.339 Exclusive state regulation of disposal or discharge of watercraft sewage, litter, and oil

Sec. 9. The state fully reserves to itself the exclusive right to establish requirements with reference to the disposal or discharge of sewage, litter and oil from all watercraft. In order to assure statewide uniformity, the regulation by any political subdivision of the state of waste disposal from watercraft is prohibited.

P.A. 1970, No. 167, § 9, Eff. Jan. 1, 1971

323.340 Rules

Sec. 10. The commission may promulgate all rules necessary or convenient for the carrying out of duties and powers conferred by this act.

P.A. 1970, No. 167, § 10, Eff. Jan. 1, 1971

323.341 Violations, penalties; permitting compliance with other maritime, marine, and navigation requirements

Sec. 11. Any person who violates any provision of this act is guilty of a misdemeanor and shall be fined not more than \$500.00. To be enforceable, the provision or the rule shall be of such flexibility that a watercraft owner, in carrying out the provision or rule, is able to maintain maritime safety requirements and comply with the federal marine and navigation laws and regulations.

P.A. 1970, No. 167, § 11, Eff. Jan. 1, 1971

323.342 Effective date

Sec. 12. This act shall take effect January 1, 1971.

P.A. 1970, No. 167, § 12, Eff. Jan. 1, 1971

P.A. 1970, No. 167 was ordered to take immediate effect and was approved August 3, 1970.

COPY

Supreme Court, U. S.
FILED

JUL 16 1972

MICHAEL RODAK, JR., CLERK

**In The
Supreme Court of the United States**

OCTOBER TERM 1972

No. 71-1082

REUBIN O'D. ASKEW, et al.,

Appellants,

-vs-

THE AMERICAN WATERWAYS OPERATORS,
INC., et al.,

Appellees.

On Appeal from the United States District Court
for the Middle District of Florida

**BRIEF OF APPELLEES, SUWANNEE STEAMSHIP
COMPANY AND COMMODORES POINT
TERMINAL CORPORATION**

JAMES F. MOSELEY

Toole, Taylor, Moseley, Gabel & Milton
Suite 1014 Barnett Bank Building
Jacksonville, Florida 32202

Attorneys for Appellees, Suwannee
Steamship Company and Commodores
Point Terminal Corporation

BLEED THROUGH POOR COPY

SUBJECT INDEX

Page

Questions presented 2

Summary of Argument 2

Argument

Point I: THE COURT BELOW CORRECTLY
HELD THAT CHAPTER 376 FLORIDA
STATUTES ANNOTATED WAS IN VIO-
LATION OF ARTICLE III, SECTION 2,
CLAUSE 3 OF THE CONSTITUTION OF
THE UNITED STATES AND WAS NULL
AND VOID WITHOUT AFFECT. 3

Point II: THE DISTRICT COURT DID NOT ERR
CONCERNING FEDERAL PREEMPTION
SINCE IT DID NOT RULE ON THIS
POINT. 22

Conclusion 24

TABLE OF AUTHORITIES

	<i>Page</i>
<i>Cases</i>	
<i>Branch v. Schumann</i> , 445 F. 2d 175 (5th Cir. 1971), 1971 A.M.C. 2536	16, 17, 23
<i>Chelentis v. Luckenbach S. S. Co.</i> , 247 U.S. 372 (1918) ..	9
<i>Gibbons v. Ogden</i> , 22 U.S. 1 (1824)	21
<i>Hamilton</i> , 207 U.S. 398 (1907)	8
<i>Huron Portland Cement Company v. Detroit</i> , 362 U.S. 440 (1960)	19, 20, 21
<i>Kermarec v. Compagnie Generale Transatlantique</i> , 358 U.S. 625 (1959)	9, 15, 17
<i>Knickerbocker Ice Co. v. Stewart</i> , 253 U.S. 149 (1920) ..	2, 9, 10
<i>Lottawanna</i> , 88 U.S. (21 Wall) 558 (1874)	7
<i>Miller v. Mayor of New York</i> , 109 U.S. 385 (1883)	22
<i>Morgan's Steamship Company v. Louisiana Board of Health</i> , 118 U.S. 455 (1886)	14, 15
<i>Railroad Company v. Fuller</i> , 84 U.S. (17 Wall) 560 (1874) ..	5
<i>Southern Pacific Company v. Jensen</i> , 244 U.S. 205 (1917) ..	2, 3, 9
<i>Southern Pacific Company v. Arizona</i> , 325 U.S. 761 (1945)	18, 19
<i>Workman v. New York City</i> , 179 U.S. 552 (1900)	6, 12

TABLE OF AUTHORITIES — Continued

Page

United States Constitution

Article I, Section 8	2
Article III, Section 2	2, 3, 8

Statutes - Federal

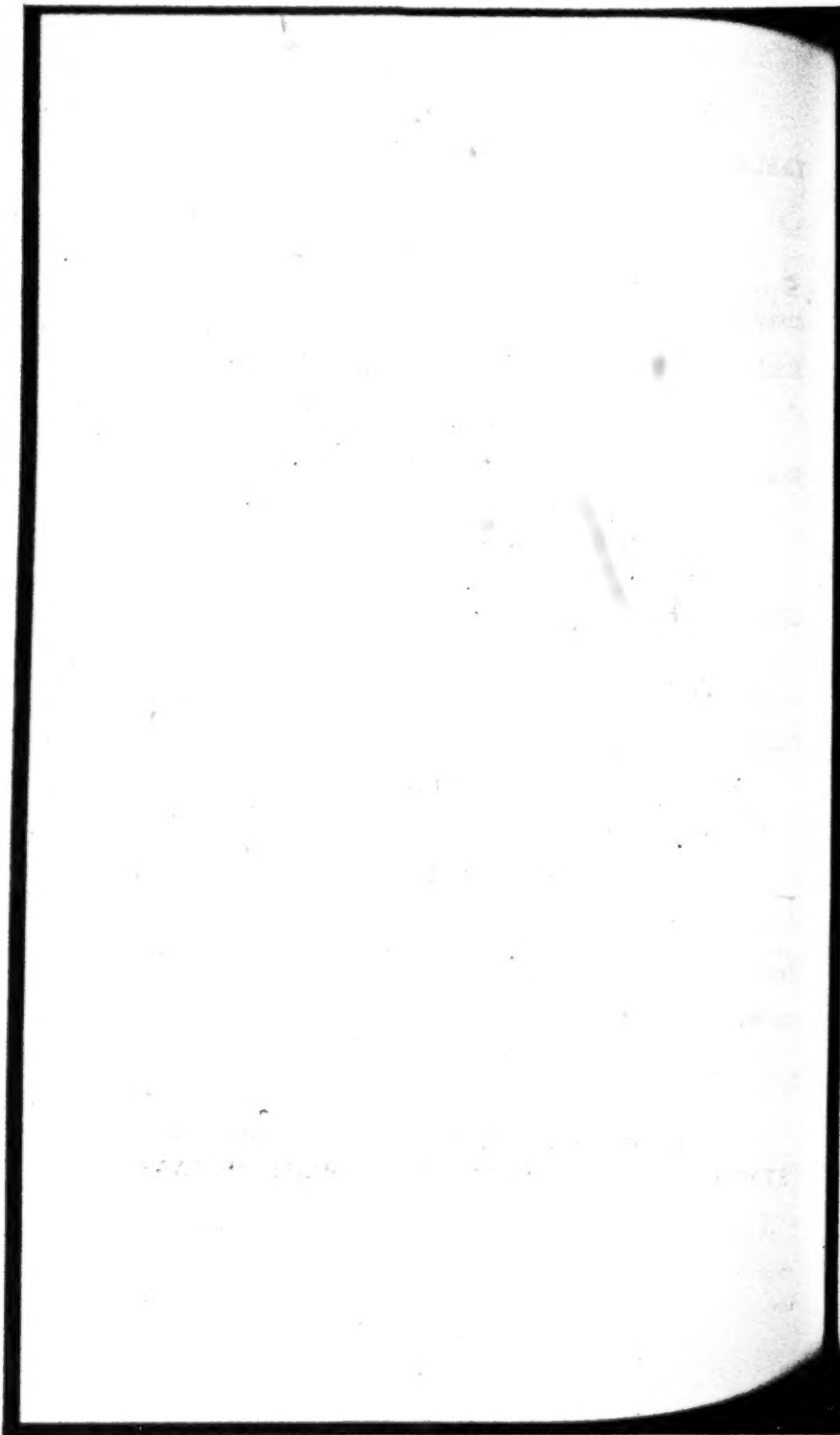
Federal Water Quality Improvement Act of 1970, Pub. L. 91-224, 91st Congress, 2nd Session (April 3, 1970)	2, 8
--	------

Statutes - State

Chapter 70-244, Laws of Florida, 1970	2
Chapter 371, Florida Statutes Annotated Section 371.52	16
Chapter 376, Florida Statutes (1970) Section 376.12	12
Section 376.14	12

Books

Benedict, THE AMERICAN ADMIRALTY (3rd ed 1894)	4
Benedict, THE AMERICAN ADMIRALTY (8th ed 1940)	21
Federalist LXXX from McLean's Edition, New York, 1788	4



BLEED THROUGH POOR COPY

**In The
Supreme Court of the United States**

OCTOBER TERM 1972

No. 71-1082

REUBIN O'D. ASKEW, et al.,

Appellants,

-vs-

**THE AMERICAN WATERWAYS OPERATORS,
INC., et al.,**

Appellees.

**On Appeal from the United States District Court
for the Middle District of Florida**

**BRIEF OF APPELLEES, SUWANNEE STEAMSHIP
COMPANY AND COMMODORES POINT
TERMINAL CORPORATION**

**REPORT OF OPINION, JURISDICTION,
STATUTES INVOLVED AND STATEMENT OF CASE**

Pursuant to Rule 40 Supreme Court Rules and Paragraph 3 thereof, Appellee makes no further statement of the case nor includes further matters covered by Rule 40(a)-(c) inclusive.

QUESTIONS PRESENTED

1. Whether the District Court erred in holding unconstitutional Chapter 70-224 Laws of Florida published at Chapter 376 Florida Statutes (1970), as an attempt to legislate within the field of substantive maritime law, that is exclusively within the Federal domain.
2. Whether the District Court erred in holding that the Federal Water Quality Improvement Act of 1970, Pub.L. 91-224, 91st Congress, 2d Session (April 3, 1970) did not create a preemption issue.

SUMMARY OF ARGUMENT

I.

The Constitution declares in Article III, Section 2, that "the judicial power shall extend to . . . all cases of admiralty and maritime jurisdiction" and Article I, Section 8, Congress is "to make all laws which shall be necessary and proper for" carrying out granted power. This Federal authority to act in maritime matters and to establish uniformity was designed to meet a need. The need existed then and exists now. The need for uniformity as pronounced in *Jensen* and *Knickerbocker* gives reason to base, as did the Court below, that the Florida Act is unconstitutional and therefore, null and void.

The Florida Act is an intrusion into the Federal Admiralty uniformity. It increases and supplements liability involving shipowners and terminal operators. In addition, defenses are abrogated, as well as, unreasonable administrative requirements are made including boarding vessels, determining the seaworthiness of vessels and the posting of insurance.

The Court below was correct in stating that the intrusion into the maritime field by this Florida Act was substantially greater than the State Act in *Jensen*.

II.

The Court below did not err concerning Federal preemption of the field since the Court did not rule on this question. Appellant states that the Court erred in construing the Federal Water Quality Improvement Act preempted State legislation. However, this is clearly not an issue in this Appeal since the Court did not so rule.

ARGUMENT

I

THE COURT BELOW CORRECTLY HELD THAT CHAPTER 376 FLORIDA STATUTES ANNOTATED WAS IN VIOLATION OF ARTICLE III, SECTION 2, CLAUSE 3 OF THE CONSTITUTION OF THE UNITED STATES AND WAS NULL AND VOID AND WITHOUT AFFECT.

The Court below correctly decided that Chapter 376, Florida Statutes Annotated, hereinafter called Florida Act, was null and void and without affect, since in violation of Article III, Section 2, Clause 3 of the Constitution of the United States. The nerve center of the case is not, as Appellant contends, i.e., land damage and/or protection of water. In its entirety the Act is a restriction, restraint, and an unwarranted interference with shipping and carriage of goods by water. For this reason, the Act earned the fate it achieved in the Court below.

A brief reflection into the past and the reason for the constitutional grant of:

(a) The judicial power shall extend to . . . all cases of admiralty and maritime jurisdiction.

(b) Congress shall make necessary and proper laws carrying out granted power.

leaves one firmly convinced of the necessity of this constitutional provision. The fact was that an urgent need for uniformity was needed when it was written and there continues to be that need for uniformity at present. Prior to the American Revolution the Vice Admiralty Courts in the then British colonies of North America were most powerful. Upon the commencement of the Revolution and the termination of these Courts, each of the thirteen states began providing its own determination of admiralty matters and it has been recognized that these state provisions varied widely. Benedict, *the American Admiralty* (third edition 1894) 89.

The reason for this Constitutional Provision is certainly clear. One can hardly fathom the consequences that would be foreseen by the allowing of each state to determine the consequences, duties, obligations and responsibilities of maritime matters relating to each state. The United States would have been the same as the Balkan countries striving against each other. This was so clear to the advocates of the Constitution that Hamilton in writing the Federalist LXXX from McLean's Edition, New York, 1788 stated:

"The fifth point will demand little animadversion. The most bigoted idolisers of State authority have not thus far shown a disposition to deny the national judiciary the cognisances of maritime causes. These so generally depend on the laws of nations, and so commonly affect

the rights of foreigners, that they fall within the considerations which are relative to the public peace. The most important part of them are, by the present confederation, submitted to federal jurisdiction."

Thus we see that even the purgatory between state maritime confusion of the Revolution and the lucidity of the Constitution, that is to say the Articles of Confederation, granted this unique and needed maritime power.

Our unique form of government has accurately been described as a miracle. The Federal-State areas of responsibility have clearly been categorized in *Railroad Company v. Fuller*, 84 U.S. (17 Wall) 564 (1874), 568:

In the complex system of polity which exists in this country the powers of government may be divided into four classes:

Those which belong exclusively to the states.

Those which belong exclusively to the national government.

Those which may be exercised concurrently and independently by both.

And those which may be exercised by the states but only until Congress shall see fit to act upon the subject.

The Court below held that the matter herein under consideration belonged exclusively to the Federal Government as listed in category two above. Our position here, as below, is that the Florida Act and the Federal Act cannot coexist, since the field of maritime belongs exclusively to the National Government.

In *Workman v. New York*, 179 U.S. 552 (1900) the Court recited the truism that the law of the state cannot neutralize or affect the admiralty or maritime jurisdiction or the operation of maritime law in maritime cases. In *Workman* the issue before the Court was whether the City of New York could be responsible for damages incurred to another vessel by the City of New York's fireboat. In holding against the position of the City of New York, the Court applied the uniform law as follows:

The practical destruction of a uniform maritime law which must arise from this premise, is made manifest when it is considered that if it be true that the principles of the general maritime law giving relief for every character of maritime tort where the wrongdoer is subject to the jurisdiction of admiralty courts, can be overthrown by conflicting decisions of state courts, it would follow that there would be no general maritime law for the redress of wrongs, as such law would be necessarily one thing in one state and one in another; one thing in one port of the United States and a different thing in some other port. As the power to change state laws or state decisions rests with the state authorities by which such laws are enacted or decisions rendered, it would come to pass that the maritime law affording relief for wrongs done, instead of being general and ever abiding, would be purely local—would be one thing today and another thing tomorrow. That the confusion to result would amount to the abrogation of a uniform maritime law is at once patent. And the principle by which the maritime law would be thus in part practically destroyed would besides apply to other subjects specially confided by the Constitution to the Federal government. Thus, if

the local law may control the maritime law, it must also govern in the decision of cases arising under the patent, copyright and commerce clauses of the Constitution . . .

The disappearance of all symmetry in the maritime law and the law on the other subjects referred to, which would thus arise, would, however, not be the only evil springing from the application of the principle relied on, since the maritime law which would survive would have imbedded in it a denial of justice . . .

In addition, the Court cited with approval the *Lottawanna*, 88 U.S. (21 Wall) 558 (1874):

One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states . . .

At Page 22 of Appellant's brief it admits what cannot be refuted, to-wit: "It is true that Congress alone may regulate maritime commerce." Then without meeting that issue the Appellant proceeds in another direction. The Court below simply said "that the Florida Act constituted an unlawful intrusion into the exclusive Federal admiralty domain to the extent that the act would change substantive maritime law." However, the Appellant by attempting to direct attention to a "sea to shore" tort would attempt to show that maritime

matters were not involved. In truth and in fact, it is the maritime matter that is before the Court. It is *not* a question of police power. It is *not* a question of whether the Constitution was correct when written, as now interpreted by the Florida Legislature but, what the Constitution actually created and what it stands for.

The criteria by which the exclusive power of the Federal government is exercised was enunciated in the *Hamilton*, 207 U.S. 398 (1907), to-wit, power over the maritime law given by the Constitution:

(a) is an independent source of authority to regulate navigation and shipping, and,

(b) is more extensive than even the commerce clause. How can it possibly be said by Appellant that the power to regulate on navigable waters in other than exclusive?

The Federal Water Quality Improvement Act of 1970, Pub. L. 91-224, 91st Congress, 2nd Session (April 3, 1970); 33 USC § 1161, hereafter termed Federal Act, restricts itself to "navigable waters." Therefore, we submit that the regulation is solely within the exclusive jurisdiction of Congress and that the State Act is void.

In *Southern Pacific Company v. Jensen*, 244 U.S. 205 (1917), the Supreme Court held that the workmen's compensation statute for the State of New York could not be applied to a longshoreman's death occurring aboard a vessel on navigable waters. The Court interpreted Section 2, Article III of the Constitution (the judicial power shall extend to . . . all cases of admiralty and maritime jurisdiction) and Section 8, Article I (Congress shall make necessary and proper laws carrying out granted power). The Court stated, "In the ab-

sence of some controlling statute the general maritime law as accepted by the Federal Courts constitutes part of our national law applicable to the matter within the admiralty and maritime jurisdiction" and further "Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country.

The Court held that the State Legislature could not affect the general maritime law since,:

"If New York can subject foreign ships coming into her port to such obligations as those imposed by her Compensation Statute, other states may do likewise. The necessary consequence would be destruction of the very uniformity in respect to the maritime matters which the Constitution was designed to establish; and freedom of navigation between the states and with foreign countries would be seriously hampered and impeded. . . .

The Legislature exceeded its authority in attempting to extend the statute under consideration to conditions like those here disclosed. So applied, it conflicts with the Constitution and to that extent is invalid."

Some two years later in *Knickerbocker Ice Co. v. Stewart*,

253 U.S. 149 (1920) the Court was confronted with the same problem wherein Congress had attempted to correct the shortcoming of *Jensen*. Congress had merely added to the saving clause "to claimants the rights and remedies under the Workmen's Compensation laws of any state." It was this amendment that was under attack. The Court in discussing a case of then recent vintage *Chelentis v. Luckenbach Steamship Co.*, 247 U.S. 372 (1918) further expanded on *Jensen* as follows:

In *Chelentis v. Luckenbach S. S. Co.* (June, 1918), 247 U. S. 372, an action at law seeking full indemnity for injuries received by a sailor while on shipboard, we said: "Under the doctrine approved in *Southern Pacific Co. v. Jensen*, no State has power to abolish the well recognized maritime rule concerning measure of recovery and substitute therefor the full indemnity rule of the common law. Such substitution would distinctly and definitely change or add to the settled maritime law; and it would be destructive of the 'uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.'" And, concerning the clause, "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it," this: "In *Southern Pacific Co. v. Jensen*, we definitely ruled that it gave no authority to the several States to enact legislation which would work 'material prejudice to the characteristic features of the general maritime law or interfere with the proper harmony and uniformity of that law in its international and interstate relations.'"

Further, as to the problem confronting the Court in *Knickerbocker* the Court stated that it was unquestionable that a uniformity was needed and that the commercial character of intercourse between states and foreign states was crucial. This was stated in the following language:

As the plain result of these recent opinions and the earlier cases upon which they are based, we accept the following doctrine: The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and em-

powered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the States all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the Federal Government was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere.

Since the beginning, federal courts have recognized and applied the rules and principles of maritime law as something distinct from laws of the several States—not derived from or dependent on their will. The foundation of the right to do this, the purpose for which it was granted, and the nature of the system so administered, were distinctly pointed out long ago. "That we have a maritime law of our own, operative throughout the United States, cannot be doubted. . . . One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states." *The Lottawanna*, 21 Wall. 558, 574, 575. The field was not left unoccupied; the Constitution itself adopted the

rules concerning rights and liabilities applicable therein; and certainly these are not less paramount than they would have been if enacted by Congress. Unless this be true it is quite impossible to account for a multitude of adjudications by the admiralty courts. See *Workman v. New York City*, 179 U.S. 552, 557, *et seq.*

This is what the law is. The regret and sincere melancholia that all persons feel, including the maritime world, over disasters should as the Torrey Canyon do not change this law. Nor does the fact that Appellant at Page 32 of its brief continues to describe the Florida Act as dealing with "sea to shore torts." The *Florida Act* certainly does not say that. Nor is the constitutional provision or the soundness of *Jensen* changed by the cost to peripheral businesses such as airlines, buses, taxis and rental car companies over which the Appellant sheds his crocodile tears.

Therefore, having reached our conclusion that the Constitution desires uniformity in maritime matters, what makes the *State Act* an intrusion thereto. Appellant would state at Page 35 of its brief that the Florida Act subjects owners of vessels and terminal facilities to two principal conditions. The first states Appellant is that under Section 376.12 anyone who permits or suffers a polluting discharge is absolutely liable to the state for clean up and for damages resulting from injury to others. The second is that F.S. 376.14 requires owners and operators of terminal facilities or vessels to maintain with the Department of Natural Resources evidence of financial responsibility based on the capacity of the terminal facility or tonnage of the ship, the cargo carried and other similar factors. However, such a cavalier and cursory summation of the Florida Act that requires, Pages 56 through 74 of Appendix is most appalling when one considers the vital factors of the Act.

What, then makes the Act such an unlawful intrusion into the exclusive Federal admiralty domain? The entire Act.

The Court below held the most obvious effect would be liability in maritime matters. The Court below stated that while the Federal Act would excuse a shipper or carrier who demonstrates that the spill was caused by an Act of God, an act of war or act of omission of a third party, the Florida Act recognizes none of these defenses. This is certainly a "principle condition."

Further, the Court below found that the remedies available under maritime law for private injuries were well settled in that oil pollution is a maritime tort. This is certainly a "principle condition."

Further, there are other substantial and onerous burdens imposed that affect maritime matters. The Court below stated these burdens were intrusions greater than in the *Jensen* case, *supra*. These intrusions dispel once and for all the "sea to shore" concept. Definitions included in the Act include defining that a "vessel" shall be considered as a terminal facility when it is making vessel to vessel transfers. "Transferred" further is defined as including both onloading and offloading. Further, Section 7 of the Act allows the Department to adopt regulations without precisely defining the scope of such regulations. The regulations are to cover, among others, the boarding of a vessel by state personnel to make a determination of requirements for minimum weather and sea conditions, for permitting a vessel to enter port and for the safety, and operation of vessels, barges, tugs, motor vehicles, motorized equipment and other equipment relating to the use and operation of terminal facilities, refineries, etc. One can well imagine a vessel with a port manager aboard sailing under the flag of the State of Florida proceeding to

the sea buoy and informing vessels of American flag and foreign flag that they cannot enter the Port of Jacksonville or some other Florida port. Then as required by Section 7(i) notify all other ports in the State of this refusal. One can further visualize the same person using subsection (g) to terminate transfer of oil products between ships and terminals at some time during the discharge or receipt of cargo still flying the flag of the State of Florida from his boat.

This is a far different situation than involved in *Morgan's Steamship Company v. Louisiana Board of Health*, 118 U.S. 455 (1886) wherein the Court upheld the right of Louisiana to disallow persons with yellow fever from coming into the area. *Morgan* is substantially different and critically different than the instant matter. The matter regulated was in essence people. It was not the ships *per se* that were the subject matter of the litigation. It was persons that may be germ carriers. In addition, it should be mentioned that cargo was also the subject of the examinations that would be conducted; however, it was not the inherent nature of the cargo that was being examined. What the cargo would be inspected on would be matters alien to its general nature, i.e. germ or contamination that might cause problems. There was no check nor investigation to determine the validity of a type of cargo coming into the City. Furthermore, the remedy was very painless and applied to everyone, i.e. fumigation. In other words, this was in the form of a temporary deterrent that could be corrected. In addition, the Court gives great credence in describing the quarantine wherein it was stated:

"This system of quarantine differs in no essential respect from similar systems in operation in all important sea ports all over the world, where commerce and civilization prevail."

In addition, the humanitarian aspect of this case was observed where the Court stated:

"Safe and ample arrangements can be made for care and treatment of diseased passengers and for the comfort of their companions, as well as the cleansing and disinfecting of the vessel."

However, the Court was called upon to answer in fact whether the fee for clearing any contamination was in fact a tonnage tax. In addition, the Court held that it was not. The rationale was simply that quarantine laws are so analogous in most of their features to pilotage laws in their relationship to commerce that no reason can be seen why the same principle should not apply. The Court justified this by saying certainly quarantine was a more sensible matter than were the half pilotage rates that were customary.

Morgan is certainly different from the Florida Statute since no requirements of liability were mentioned or even suggested, nor was there any requirement that bonds be posted or insurance be set forth to cover the monies charged during the fumigation, and certainly there was no requirement that any vessel owner be liable without fault for any contagion or any plague that he might trigger by having a diseased passenger or crewmember on board. In all candor, we submit that the *Morgan* case is inapplicable and need not require further discussion.

What the states can and cannot do in the maritime field should hardly come as any great surprise to the State of Florida or the amicus curiae in this case. In *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959) the Court applied the general maritime law and not the law of the State of New York to an injury sustained by a visitor on board a vessel in New York Harbor.

In a most relevant case of recent vintage, not cited in Appellant's brief, a Florida statute was under consideration by the United States Court of Appeals for the Fifth Circuit. In *Branch v. Schumann*, 445 F.2d 175 (5th Cir. 1971) 1971 A.M.C. 2536, the Court had under interpretation a Florida statute F.S.A. §371.52 that provided:

"All boats, of whatever classification, shall be considered dangerous instrumentalities in this state and any operator of such boats shall, during any utilization of said boats, exercise the highest degree of care in order to prevent injuries to others. Liability for negligent operation of a boat shall be confined to the person in immediate charge or operating the boat and not the owner of a boat, unless he is the operator or present in the boat when an injury or damage is occasioned by the negligent operation of such vessel, whether such negligence consists of a violation of the provisions of the statutes of this state, or negligence in observing such care and such operation as the rules of the common law require."

The Plaintiff asserted that the Florida statute imposed the highest degree of care on an owner-operator of a motor boat and accordingly submitted a requested instruction thereon. The trial judge refused to grant such an instruction and the Court of Appeals affirmed. The Court held concerning the applicability of the Florida statute that admiralty retains exclusive jurisdiction of this accident since the alleged tort occurred upon navigable waters. Once admiralty jurisdiction is established then all of the substantive rules and precepts peculiar to the law of the sea become applicable.

The Plaintiff attempted to argue that *Kermarec* simply set a minimum standard of care which any state, in its discretion

may supplement by imposing a stricter burden on the owner of a vessel in relation to his conduct towards guests. The Court, however, stated that they were "unimpressed by plaintiff's linguistic gyrations." And that any such supplementation necessarily entails alteration of an admiralty norm in direct contravention of the quest for uniformity and the Supreme Court's *Kermarec* mandate that the defendant's conduct be measured by maritime standards. We submit that the reasoning of *Kermarec* and the *Branch case* shows another judicial pronouncement as to the exclusiveness of the maritime jurisdiction and further puts to rest the theory of the state in this case wherein they attempt to show that the Florida statute was merely a supplementary facet and was filling in "gaps" that existed in the Federal Enactment.

Appellant attempts to reduce the argument of Appellees "to its last analysis." However, their analysis of our position is incorrect. Our position is simply that there is no collision between the exclusive admiralty facets of the Federal law and police power. It is simply that the former controls in this matter. The collision never comes into being. The Court below stated that the second contention of Appellees was that the Florida Act violated the commerce clause, but the Court further stated (Page 40 Appendix) that the resolution of the initial contention concerning the exclusive federal domain matter dictated that the second contention need not be discussed. However, since plaintiffs resurrected this issue in their brief we would desire to discuss same.

If we assume *arguendo* that the National government does not have any exclusive right to regulate maritime and shipping on navigable waters by means of the Federal Act herein then it is necessary to determine whether or not the matter can be the subject of exercising of power concurrently and independently by both sovereigns. Apart from the maritime

powers, certainly no one would quarrel with the constitutional grant of power over interstate commerce that likewise requires and demands a single uniform rule. Further, a state statute by its wording or operation that prevents, obstructs or burdens interstate commerce is certainly invalid regardless of its purpose and not even the police power of the state can justify a *substantial* interference with interstate commerce.

In *Southern Pacific Company v. Arizona*, 325 U.S. 761 (1945) the Court had under its review an Arizona statute, entitled the Arizona Train Limit Law. The law made it unlawful for any person or corporation to operate within the state a railroad train of more than fourteen passenger cars or seventy freight cars. In holding the law to be an unconstitutional burden on interstate commerce, the Court stated that Congress by acting in the interstate commerce field is not deemed to have stricken every state statute protecting health and safety of the public, but if the State law in terms of its practical administration interferes then it should be void. Mr. Chief Justice Stone speaking for the Court stated:

But ever since *Gibbons v. Ogden*, 22 U.S. 1, the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state or regulate those phases of the national commerce which because of the need of national uniformity demand that their regulation be prescribed by a single authority.

The Court held there was a serious burden on interstate commerce because the railroad was subject to regulation that was not uniform throughout the various states, and that railroads would be burdened in having to change its flow of transportation in every state. As a result the unsatisfied need

for uniformity in regulation was evident. The Court thereupon concluded that the state interest cannot be preserved at the expense of the national interest.

How similar is the instant situation where there is such a substantial burden on shipping. The State Act with its numerous persons boarding the vessels, determining weather and wind conditions for future movement, the requiring of filing various papers by owners and operators with state agencies is so akin to the *Southern Pacific* case to be readily apparent. *Southern Pacific* and the instant case involve physical matters, i.e. hampering of trains and ships. In our case there are also physical matters, acts and possible consequences that might flow to vessel owners, operators and terminal owners and operators that will have consequences upon interstate and foreign commerce.

Appellant relies strongly on *Huron Portland Cement Company v. Detroit*, 362 U.S. 440 (1960) since at first blush there appears to be some similarities. However, a closer review shows otherwise. Before the Court was a record involving the enforcement of a criminal provision of the Municipal Code of Detroit for violation of smoke emission provisions. There was no meeting of vessels by city employees, determining weather conditions, requiring posting of insurance, nor was there the unlimited liability provision, nor was there a provision that defenses would not be available but that there was absolute liability. Further, the ordinance applied to everyone and everybody and the penalties apparently were uniform. The Court stated that the Constitution in conferring upon Congress the regulation of commerce did not intend to terminate the states from legislating on all subjects relating to health and welfare. In

other words the situation was that all citizens or visitors in the Detroit area might be subject to a miniscule hundred dollar fine if certain smoke was emitted. However, the same could conceivably be true where the master of the vessel would be penalized for jay walking or littering a public park. Most assuredly the Detroit ordinance was not a "substantial burden." In addition, the Court recognized that a state may not impose a burden which materially affects interstate commerce and in an area where uniformity of regulation is necessary, with numerous cases cited. Thus, in the *Huron Portland Cement Company* case the Court realized that no uniformity was necessary and further found that the ordinance did not place an undue burden on any commercial venture.

The instant case is far different from *Huron*.

Mr. Justice Stewart stated that "although verbal generalizations do not of their own motion decide concrete cases, . . .", they provide framework for determination. We submit that the verbal generalizations of the two cases hereinbefore cited concerning the concurrent jurisdiction show many similarities with the train limit law, and little with the Detroit air ordinance, where no uniformity was required. The general distinction is that the Florida Act is an oppressive burden upon interstate commerce in that it requires massive administrative and procedure measures to be met by those in foreign and interstate commerce. Such measures as filing various financial documents, evidence of insurance (with the insurance companies making certain commitments as to direct suits), and other procedural matters are near impossible for anyone less than giant corporations. In addition, while the Florida Act purports to apply to "everyone" only vessel operators, masters, and terminal operators are required to go through the administrative jungle.

In addition, there is physical interference, direct and indirect. The Florida Act and Regulations in connection therewith, have persons boarding vessels, making navigation decisions without any requirement that they be licensed or that they be competent regarding the decisions that they are making. As in the *Arizona* case, there has been no showing by the State that this burden will benefit the health and welfare of Florida citizens. There has been absolutely no showing that the burden being placed upon shipowners, operators, and terminal operators would in any way protect the public. With untrained persons swarming all over vessels and terminals it is more than likely that the result will be more accidents than ever. Vessel owners, operators and terminal operators would more than likely need protection from the protector.

This Florida Act is not an exercise of police power. It is not the rapier-like thrust of the hundred dollar fine in the *Huron* case. But, it is the bludgeoning of the sledge hammer against the maritime interest that exists in the State of Florida.

Departing from *Huron Portland Cement*, we feel that the Florida Act is further oppressive on interstate commerce. The familiar case of *Gibbons v. Ogden*, 22 U.S. 1 (1824) need hardly be the subject of a recitation of facts, suffice it to say that the acts of the Legislature of the State of New York in granting Robert Livingston and Robert Fulton the exclusive navigation within the jurisdiction of that state for boats moved by steam for a term of five years was void under the commerce clause. In essence, it stands for the proposition that a state may not grant a monopoly of navigation on interstate navigable waters. See I Benedict *American Admiralty* 83 (6th ed. 1940). However, the instant statute *de facto* creates what could not be done directly. While there is no

grant of waters to person named such as Livingston and Fulton what the Florida Legislature has said in essence is, we grant use of our interstate waters only to those who can afford to use them. It is a monopoly granted to those who can meet the financial requirements or who will not be wiped out by a disaster wherein they can plead no defenses. This type of monopoly to the ones who can afford to trade in Florida water is just as unfair as that monopoly that was granted to Livingston and Fulton.

II.

THE DISTRICT COURT DID NOT ERR CONCERNING FEDERAL PREEMPTION SINCE IT DID NOT RULE ON THIS POINT.

Appellants state that the District Court erred in construing the Federal Act as pre-empting the states from enacting legislation. The Court simply did not so hold, and this is not an issue. The Court below very appropriately analyzed the applicable portion of the Federal Act and stated "the statement that Congress did not intend to preclude state imposed liability for oil pollution simply means that the states are free to enforce pollution control measures that are within their constitutional prerogative." That is to say regulating of the *Huron* type case and non-navigable water type cases is possible.

The Federal Act regulates discharge into and upon navigable waters. This is little conflict as to what navigable waters are, as an example, an acceptable definition has been set forth in *Miller v. City of New York*, 109 U.S. 385 (1883). The Court stated that navigable waters of the United States, such as are under the control of Congress, are such waters as are navigable in fact, in which by themselves or their con-

nection with other waters, form a continuous channel for commerce with foreign countries or among the states. This would be the type of water that would be involved in a civil case under Rule 9(h). It was into that field that Congress moved with the specific Act that we are discussing.

For many years Congress had been active in areas of navigable waters, as well as, upon the high seas. But, the State of Florida is allowed, without fear of any State-Federal conflict, to move into the area of local concern. This area is non-navigable waters. For example, the City or State may clean up back creeks or protect any of our tourist attraction lakes anywhere in the state. In addition, some rivers within the state are and have been declared to be non-navigable and merely an easement to a navigable stream such as certain headwaters of the Suwannee River. How far afield and duplicitous it is to have both the Federal and State governments working in the area of navigable bodies of water; with the result, no one claiming the waters within the State such as the lakes and non-navigable areas. Of course, the Federal government will not act in that non-navigable field.

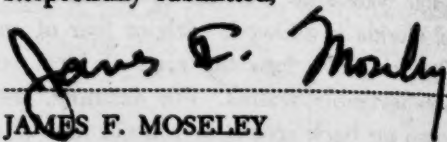
The state's theory once again is predicated upon the fact that they can supplement or fill a "gap." However, as set forth in *Kermarec* and *Branch v. Schumann*, supra, supplementation does not exist. For the Federal government to be supreme in admiralty and maritime matters and for the state to be allowed to move in non-maritime matters does not relegate our Republic to a situation that "Federalism is an academic theory," as advanced by Appellant.

We submit that preemption has not been the subject of determination by the Court and that this is not an issue on appeal.

CONCLUSION

For the reasons and authorities hereinbefore set forth, this Appellee moves and requests this Court to affirm the District Court Judgment declaring that the Florida Act to be null and void.

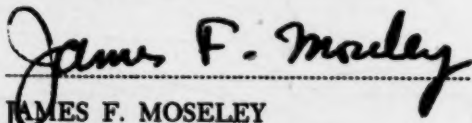
Respectfully submitted,



JAMES F. MOSELEY

Attorney for Appellees, Suwannee
Steamship Company and Commodores
Point Terminal Corporation
Suite 1014 Barnett Bank Building
Jacksonville, Florida 32202

I certify pursuant to Rule 33 that three (3) copies of this brief have been mailed, first class and/or air mail as required this 14th day of July, 1972 to all parties of Record.



JAMES F. MOSELEY

Toole, Taylor, Moseley, Gabel & Milton
1014 Barnett Bank Building
Jacksonville, Florida 32202

1. Copy to be made to July 22 that there is (3) copies of the
all that have been made that they are not to be repeated
the last day of July 1971 in the name of Joseph

Joseph F. Murphy
JOSEPH F. MURPHY

1. Copy to be made to July 22 that there is (3) copies of the
all that have been made that they are not to be repeated
the last day of July 1971 in the name of Joseph

BLEED THROUGH POOR COPY

1a

IN THE UNITED STATES DISTRICT COURT
IN THE MIDDLE DISTRICT OF FLORIDA,
JACKSONVILLE DIVISION.

CIVIL ACTION NO. 71-156-Civ-J

THE AMERICAN WATERWAYS OPERATORS, et al.,
Plaintiffs,

and

SUWANNEE STEAMSHIP CO., a Florida corporation and
COMMODORES POINT TERMINAL CORPORATION, a
Delaware corporation and AMERICAN INSTITUTE OF
MERCHANT SHIPPING, et al.,

Intervening Plaintiffs,

vs.

REUBIN O'D. ASKEW, as Governor of the
State of Florida, et al.,

Defendants.

COMPLAINT OF INTERVENING PLAINTIFFS,
SUWANNEE STEAMSHIP CO. AND COMMODORES
POINT TERMINAL CORPORATION

COME NOW the Intervening Plaintiffs, SUWANNEE STEAMSHIP CO., a Florida corporation and COMMODORES POINT TERMINAL CORPORATION, a Delaware corporation and allege as follows:

1. SUWANNEE STEAMSHIP CO. is a Florida corporation with its principal office in Jacksonville, Duval County, Florida. Said Intervening Plaintiff is engaged in the Port of

Jacksonville, Duval County, Florida and other ports within the State of Florida in the capacity of a vessel owner and/or operating agents for vessels engaged in foreign ports and ports within the State of Florida. Said vessels carry among other things cargo that comes within the definition of "Pollutants" as set forth in Chapter 70-244 Laws of Florida, 1970, compiled as Chapter 376, Florida Statutes.

2. Commodores Point Terminal Corporation, a Delaware corporation with offices in Jacksonville, Florida owns and/or leases an oil storage facility and transfer facility located at the foot of East Adams Street, Jacksonville, Duval County, Florida servicing the Owners and Operators of vessels engaged in foreign commerce between foreign ports and the Port of Jacksonville, and also those in the coastal trade. As such said Intervening Plaintiff comes within the purview of Chapter 70-244, Laws of Florida, 1970, compiled as Chapter 376, Florida Statutes.

3. Defendants are citizens of the State of Florida.

4. Intervening Plaintiffs herein, adopt and incorporate the allegations of the original complaint filed by the American Waterways Operators, Inc., et al., heretofore filed herein.

5. Jurisdiction is vested in this Honorable Court by the provisions of 28 U.S.C. § 1331, that is to say, a Federal Question, and by the Constitution of the United States of America.

6. Intervening Plaintiffs being vessel operators and/or operating agents and/or terminal owners, operators, and/or lessors, allege that the Chapter 70-244, Laws of Florida, 1970, compiled as Chapter 376, Florida Statutes, any and all Rules and Regulations promulgated thereunder by any State agencies including but not limited to, the Florida Department of Natural Resources and any enforcement thereof by any Governmental Agency or Department of the State of Florida is

unlawful by reason of the unconstitutionality of said Act in the following ways, to-wit:

(a) That the Constitution of the United States grants the non-delegable power and duty to Congress to legislate a uniform maritime law. Congress has so legislated and preempted the field concerning pollution upon and into navigable waters of the United States, as well as on the high seas.

(b) That the Florida Act attempts to vest admiralty and maritime jurisdiction in the State of Florida and said State's Agencies contrary to the Constitution of the United States of America.

(c) That said Act places an oppressive burden on international commerce and interstate commerce by water.

(d) That said Act favors transportation, carriage and storage of liquid cargo by means and modes other than those owned or operated by Intervening Plaintiffs herein and thereby Intervening Plaintiffs are denied equal protection of the laws.

(e) That intervening Plaintiffs as owners and operators of vessels and/or terminals are subjected to penalties, regulations, requirements and absolute liability not inflicted upon other modes of transportation of cargo in denial of equal protection of the law.

(f) That the Act deprives the Intervening Plaintiffs of property without due process of law.

(g) That said Act interferes with, infringes upon and may abrogate Intervening Plaintiffs pre-existing contractual obligations.

WHEREFORE, Intervening Plaintiffs, SUWANNEE

STEAMSHIP CO., a Florida corporation, and COMMODORES POINT TERMINAL CORPORATION, a Delaware corporation and AMERICAN INSTITUTE OF MERCHANT SHIPPING, et al., petition for this Honorable Court to grant relief as follows:

(a) To enter Judgment declaring Chapter 70-244, the Laws of the State of Florida, as compiled as Chapter 378, Florida Statutes, to be null, void and without effect due to the unconstitutionality thereof.

(b) To permanently enjoin Defendants in their enforcing of any provisions of said Act, any regulation or rule thereunder promulgated.

(c) To award costs of said Intervening Plaintiffs.

(d) To grant such order and further relief as deemed appropriate by this Honorable Court.

KURZ, TOOLE, TAYLOR, MOSELEY
& GABEL

JAMES F. MOSELEY

By _____
Attorneys for Intervening Plaintiffs,
Suwannee Steamship Co., and
Commodores Point Terminal Corporation,
Suite 1014 Barnett Bank Building
Jacksonville, Florida

I HEREBY CERTIFY THAT a copy hereof has been furnished upon ERWIN, PENNINGTON, VARN & JACOBS, ESQUIRES, ATTORNEY GENERAL, Attention: Honorable

Daniel Dearing, State of Florida and to HEALLY AND BAILLIE, and HAIGHT, GARDNER, POOR & HAVENS and FOWLER, WHITE, HUMKEY, BURNETT, HURLEY & BANICK this 29th day of March, 1971.

/s/ JAMES F. MOSELEY

Attorney

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE, FLORIDA.

NO. 71-156-Civ-J

THE AMERICAN WATERWAYS OPERATIONS, INC., a Delaware corporation; GULF ATLANTIC TOWING CORPORATION, a Florida corporation; GLIDDEN-DURKEE, a division of SCM, CORPORATION, a New York corporation; DIXIE CARRIERS TRANSPORT COMPANY, INCORPORATED, a Louisiana corporation; NATIONAL MARINE SERVICE, INC., a Delaware corporation, THE REVILO CORPORATION, a Florida corporation; EASTERN SEABOARD PETROLEUM COMPANY, INC., a Florida corporation; NILO BARGE LINE, INC., a Delaware corporation; STEUART TRANSPORTATION COMPANY, a Delaware corporation; INTERSTATE OIL TRANSPORT COMPANY, a Delaware corporation; FEDERAL BARGE LINES, INC., a Delaware corporation; and GULF CANAL LINES, INC., a Texas corporation; and INGRAM OCEAN SYSTEM, INC., a Delaware corporation, all authorized to do business in the State of Florida.

Plaintiffs,

SUWANNEE STEAMSHIP COMPANY, a Florida corporation and COMMODORES POINT TERMINALS CORPORATION, a Delaware corporation,

Applicants for
Intervention,

vs.

RICHARD B. STONE, as Secretary of State of the State of Florida; ROBERT L. SHEVIN, as Attorney General of the State of Florida; FLOYD T. CHRISTIAN, as Commissioner of Education of the State of Florida; DOYLE E. CONNER, as Commissioner of Agriculture of the State of Florida; FRED O. DICKINSON, JR., as Comptroller of the State of Florida; and THOMAS D. O'MALLEY, JR., as Treasurer of the State of Florida; as and constituting THE DEPARTMENT OF NATURAL RESOURCES, State of Florida; and RANDOLPH HODGES, as Executive Director and TOM SIMPSON, as Conservation Officer of Duval County, DEPARTMENT OF NATURAL RESOURCES, State of Florida.

Defendants.

**MOTION TO INTERVENE AS
PLAINTIFFS UNDER RULE 24**

SUWANNEE STEAMSHIP COMPANY, a Florida Corporation, and COMMODORES POINT TERMINAL CORPORATION, a Delaware Corporation, by and through their undersigned attorneys move the Court for leave to intervene as Plaintiffs in this action, in order to assert their claims and rights hereinafter set forth.

1. SUWANNEE STEAMSHIP COMPANY, a Florida Corporation, is engaged as Owners and/or operating agents for vessels engaged in foreign commerce trading between foreign ports in international commerce and ports in the State of Florida.

2. **COMMODORES POINT TERMINAL CORPORATION**, a Delaware Corporation, is engaged in the ownership and operating of oil storage facilities and transfer facilities located in the Port of Jacksonville, Florida, servicing the Owners and Operators of vessels engaged in foreign commerce between foreign ships and the Port of Jacksonville.

3. Representation of Applicants' interest between existing parties is or may be inadequate and the Applicants are or may be bound by a judgment in this action presenting both questions of law and of fact which are common to the main action.

4. The business and operation of each of the Applicants to intervene involves the transportation and handling of cargo which comes within the purview of both the "Federal Act" and the "State Act" involved in the main action as it affects intervening Applicants' interest in foreign commerce.

5. The "State Act" is unconstitutional and void in that it violates the provisions of the United States Constitution in all aspects as set forth in the main action insofar as the intervening Applicants' interest in foreign commerce is concerned and the intervening Applicants have no adequate remedy at law to prevent iraparable harm, except by way of injunction to restrain Defendants in the enforcement, execution and administration of the "State Act" with respect to intervening Applicants' interest in foreign commerce.

WHEREFORE, intervening Applicants pursuant to Rule 24 pray that the Court enter its Order permitting intervening Applicants the right to intervene and to grant to the intervening Applicants the same relief set forth and prayed for by Plaintiffs.

**KURZ, TOOLE, TAYLOR, MOSELEY
& GABEL**

8a

By /s/ CLARK W. TOOLE, JR.
/s/ CLARK W. TOOLE, JR.

Attorneys for SUWANNEE STEAM-
SHIP COMPANY, a Florida Corpo-
ration and COMMODORES POINT
TERMINAL CORPORATION, a
Delaware Corporation
Suite 1014 Barnett Bank Building
Jacksonville, Florida 32202

I HEREBY CERTIFY that copies of the foregoing Motion
to Intervene for Defendants this 11th day of March, 1971.

/s/ CLARK W. TOOLE, JR.
Attorney

STATE OF FLORIDA :
COUNTY OF DUVAL :

Before me, the undersigned authority, personally appeared
WILLIAM D. LOVETT of Jacksonville, Duval County,
Florida and, being duly sworn, deposes and says that the
facts and matters alleged in the foregoing Motion to Inter-
vene are true and correct.

/s/ WILLIAM D. LOVETT
William D. Lovett

Sworn to and Subscribed
before me this 10th day of
March, 1971.

/s/ MARIE A. HAGGERTY
NOTARY PUBLIC. State of Florida at
Large. My Commission expires: April 20, 1974.

E COPY

Supr

THE AME

ON APPEAL

BRIEF O
OF THE

E COPY

Supreme Court U. S.
FILED

AUG 8 1972

Supreme Court of the United States

JR., CLERK

October Term 1971

No. 71-1082

REUBEN O'D. ASKEW, *et al.*,

Appellants,

against

THE AMERICAN WATERWAYS OPERATORS, INC., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF FLORIDA

**BRIEF OF THE MARITIME LAW ASSOCIATION
OF THE UNITED STATES AS AMICUS CURIAE,
IN SUPPORT OF AFFIRMANCE**

JOHN C. MCHOSE
Attorney for the
Maritime Law Association of the
United States, *Amicus Curiae.*

BLEED THROUGH POOR COPY

SUBJECT INDEX

	PAGE
Question Presented	1
Interest of Amicus Curiae	2
ARGUMENT:	
I—By adopting the Admiralty Clause of the United States Constitution, the individual States surrendered to the Federal Government the paramount power to legislate in the maritime field and to define the general maritime law which must prevail throughout the country	5
II—Congress has enacted legislation specifically covering the same areas as those covered by the Florida Act; that Act would therefore be unconstitutional even if it were not invalid under the Admiralty Clause itself	7
(a) The conflict between the Florida Act and federal law governing the maritime tort of water pollution	7
(b) The conflict between the Florida Act, on the one hand, and federal legislation and international agreements governing the construction, maintenance and inspection of vessels, on the other	8
(c) The conflict between the Florida Act and federal statutes relating to limitation of liability	9
III—The Act for the Extension of Admiralty Jurisdiction was a valid exercise by Congress of its Constitutional power to legislate in the maritime field	11
CONCLUSION	15

CONSTITUTION OF THE UNITED STATES

ARTICLE 1, SECTION 8, CLAUSE 18 (THE NECESSARY AND PROPER CLAUSE)	note 12, 7
ARTICLE 3, SECTION 2, CLAUSE 3 (THE ADMIRALTY CLAUSE)	2, 6, 7
ARTICLE 6, CLAUSE 2 (THE SUPREMACY CLAUSE)	9

FEDERAL STATUTES

33 U.S.C.

§§901-50 (Longshoremen's and Harborworkers' Compensation Act)	14
§§1161-75 (The Water Quality Improvement Act of 1970)	8, 9, 10

46 U.S.C.

§182 (The Fire Statute)	14
§§183-9 (The Limited Liability Act)	8, 9, 10, 15
§§361-436 (Inspection, Construction and Altera- tion of Steam Vessels)	9
§688 (The Jones Act)	14, 15
§§727-31 (The Salvage Act)	3
§740 (The Admiralty Extension Act)	3, 11-12, 15
§911-84 (The Preferred Ship Mortgage Act) ...	14
§§1300-15 (The Carriage of Goods by Sea Act)	3
24 STAT. 329-0 (The New York Harbor Act of 1886)	8

FEDERAL REGULATIONS

46 C.F.R. §§ 1-199	9
--------------------------	---

INTERNATIONAL AGREEMENTS

PAGE

Bills of Lading:

1924 Ocean Bills of Lading Convention, 51 STAT. 233 (1937)	3
---	---

Collision:

1910 Collision Convention, 6 BENEDICT 37	3
--	---

Limitation of Liability:

1957 Limitation of Liability Convention, 6A BENEDICT 634	3
---	---

Maritime Liens & Mortgages:

1968 Maritime Liens and Mortgages Convention, <i>C. Davis, U.S. Delegation to 12th Session of Diplomatic Conference on Maritime Law, Re- port to the Secretary of State (Oct. 10, 1967)</i>	3
--	---

Oil Pollution:

1969 Civil Liability for Oil Pollution Damage Convention, 6A BENEDICT 951	3
--	---

Salvage:

1910 Assistance and Salvage Convention, 37 STAT. 1658 (1913)	3
---	---

Safety of Life at Sea:

1960 SOLAS Convention, TIAS 5780, 16 UST 185, 536 UNTS 27 (1965)	9
---	---

STATE STATUTES

Chapter 376, Florida Statutes (1970)	1, 6, 7
§376.08	8
§376.19	11

CONGRESSIONAL AND EXECUTIVE MATERIALS

Executive:

- C. Davis, U.S. Delegation to 12th Session of
Diplomatic Conference on Maritime Law,
Report to the Secretary of State (Oct. 10,
1967)* note 11

Senate:

- 118 Cong. Rec. S6021-48 (daily ed. April 12,
1972) note 16
- Federal Water Pollution Control Act Amend-
ments of 1971, S.2770, 92nd Cong., 1st
Sess. note 16
- Senate Foreign Relations Committee, Execu-
tive Report No. 92-9, "1969 Oil Pollution
Conventions and Amendments", August 5,
1971, 92nd Cong., 1st Sess. note 11

House:

- 118 Cong. Rec. H3770 (daily ed. May 1, 1972) note 16
- Federal Water Pollution Control Act Amend-
ments of 1971, H.R. 11896, 92nd Cong., 1st
Sess. note 16

TREATISES AND LAW REVIEWS

- Bergren, *Effects of Recent Legislation upon the
Admiralty Law*, 17 Geo. Wash. L. Rev. 353
(1949) 15
- Fauver, *The Extension of Admiralty Jurisdiction
to Include Maritime Torts*, 27 Geo. L. J. 252
(1949) 15
- GILMORE & BLACK, *THE LAW OF ADMIRALTY* (1957),
p. 43 7

IN THE
Supreme Court of the United States

October Term 1971

No. 71-1082

REUBEN O'D. ASKEW, et al.,

Appellants,

against

THE AMERICAN WATERWAYS OPERATORS, INC., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF FLORIDA

**BRIEF OF THE MARITIME LAW ASSOCIATION
OF THE UNITED STATES AS AMICUS CURIAE,
IN SUPPORT OF AFFIRMANCE**

The Maritime Law Association of the United States ("The Association") respectfully submits this Brief as *amicus curiae* in support of affirmance, on consent of all parties, pursuant to Rule 42.2.¹

Question Presented

This appeal has been taken by the Florida authorities from the unanimous decision of a three-judge court holding the Florida Oil Spill Prevention and Control Act² unconsti-

¹ The original letters consenting to submission of this Brief have been submitted to the Clerk for filing herewith.

² Chapter 376, FLORIDA STATUTES (1970); see Appendix, pp. 56-73.

tutional under the Admiralty Clause of the United States Constitution³ on the ground that "admiralty cannot tolerate the inconsistency inherent in accommodating state remedial statutes to exclusively maritime substantive concepts." (335 F. Supp. 1241, at 1249). The basic question presented, therefore, is:

"Whether the District Court erred in holding that the Florida Act is invalid under the Admiralty Clause."⁴

Interest of Amicus Curiae

The Maritime Law Association of the United States was founded in 1899, under the Presidency of the late Robert Dewey Benedict, Esq., author of the leading American Treatise on Admiralty. It has a nation-wide membership of more than 2,000 practicing admiralty attorneys, judges, professors of law and others interested in maritime law. The Association's 1,640 attorney members represent the full range of maritime interests—vessel owners, shippers, consignees, charterers, seamen, passengers, owners of shore-front properties, marine insurance underwriters and other actual or potential maritime claimants and defendants. Its objects are set forth as follows in its Articles of Association:

"The objects of the Association shall be to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its ad-

³ CONSTITUTION, ARTICLE 3, SECTION 2, CLAUSE 3: "The judicial Power shall extend . . . to all cases of admiralty and maritime Jurisdiction."

⁴ Motion by Appellees American Institute, *et al.* to affirm, dated March 20, 1972, at p. 5.

ministration, and to act with foreign and other associations in efforts to bring about a greater harmony in the Shipping Laws, regulations and practices of different nations."

In furtherance of these objectives the Association, during the 73 years of its existence, has sponsored such legislation as the Salvage Act (1912),⁵ the Carriage of Goods by Sea Act (1936)⁶ and the Admiralty Extension Act (1948).⁷ From time to time it recommended improvements in the former General Admiralty Rules of this Court, and more recently it assisted the Advisory Committee on Admiralty Rules in the unification of the General Admiralty Rules and the Federal Rules of Civil Procedure. The Association has actively participated, with the 30 other national maritime law associations constituting the Comité Maritime International,⁸ in the movement to achieve maximum international uniformity in maritime law through the medium of international conventions, such as those relating to Assistance and Salvage (1910),⁹ Ocean Bills of Lading (1924),¹⁰ Collisions (1910), Limitation of Liability of Owners of Sea-Going Vessels (1957), Maritime Liens and Mortgages (1968), and Civil Liability for Oil Pollution Damage (1969).¹¹

⁵ 46 U.S.C. §§ 727-31.

⁶ 46 U.S.C. §§ 1300-15.

⁷ 46 U.S.C. § 740.

⁸ These now include the national associations of Argentina, Belgium, Brazil, Bulgaria, Canada, Chile, Denmark, Finland, France, Germany, Greece, India, Ireland, Israel, Italy, Japan, Yugoslavia, Mexico, Morocco, The Netherlands, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, The United Kingdom, The United States, Uruguay, and The U.S.S.R.

⁹ 37 STAT. 1658 (1913).

¹⁰ 51 STAT. 233 (1937).

¹¹ 1910 Collision Convention, 6 KNAUTH'S BENEDICT ON ADMIRALTY 37 (7th Ed., rev.) (hereinafter BENEDICT); 1957 Limitation of Liability Convention, 6A BENEDICT 634; 1968 Maritime Liens and

The Association has consistently and vigorously maintained that the very nature of international shipping dictates that it should, to the maximum extent possible, be governed by internationally uniform laws, and that until such time as international uniformity can be achieved in a particular area of the maritime law, there should at least be nation-wide uniformity. The Association's objectives are completely in accord with the Admiralty Clause of the Constitution of the United States and the venerable line of decisions of this Court interpreting that Clause. In those decisions, commencing with *The Lottawanna*, 88 U.S. 558 (1874) and continuing through *Moragne v. States Marine Lines*, 398 U.S. 375 (1970), this Court has repeatedly held that except in areas of purely local concern, Congress alone may enact maritime legislation, and that in the absence of federal legislation in a particular area of the maritime law, it is for this Court and the lower federal courts to define the general maritime law which is to prevail throughout the United States.

The holding of the three-judge court from which this appeal has been taken is in perfect harmony with these decisions. A reversal would turn back the clock, undoing the nation-wide uniformity in the maritime law painstakingly achieved by this Court over the past century. Allowing each state unfettered, uncoordinated legislative control

Mortgages Convention, C. Davis, U.S. Delegation to 12th Session of Diplomatic Conference on Maritime Law, Report to the Secretary of State (October 10, 1967); and 1969 Oil Pollution Convention, 6A BENEDICT 951. These last four conventions have not as yet been ratified by the United States, although the Senate Foreign Relations Committee has reported favorably on the 1969 Civil Liability for Pollution Convention, Senate Foreign Relations Committee, Executive Report No. 92-9, "1969 Oil Pollution Conventions and Amendments", August 5, 1971, 92nd Cong., 1st Sess. The Conventions on Collisions and Limitation of Liability have been adopted by most of the principal maritime powers and the Association has recommended passage of Congressional statutes embodying the principles of these Conventions.

over maritime law in the area of water pollution prevention and liability would sound the death knell of uniformity, and eventually lead to nothing less than complete chaos in the waterborne commerce of the United States and of the foreign powers on whose merchant marines the American public has come to rely in large measure for a steady supply of needed commodities which must be carried by sea.

ARGUMENT

I

By adopting the Admiralty Clause of the United States Constitution, the individual States surrendered to the Federal Government the paramount power to legislate in the maritime field and to define the general maritime law which must prevail throughout the country.

The basic principle was correctly stated in the opinion below:

"It is well settled that state legislation is invalid where it is in contravention with general admiralty rules or congressional enactments in the maritime field." *The American Waterways Operators, Inc. v. Askew*, 335 F. Supp. 1241, 1248 (M.D. Fla. 1971).

State legislation controlling water pollution from industrial plants and other shoreside installations is not within the province of the Association. Nor does the Association have any quarrel with the rights of states to legislate in areas of purely local concern, even though such legislation may relate to vessels employed on waters within the admiralty and maritime jurisdiction of the United States. State pilotage laws, for example, fall within this category. *Cooley v. Board of Wardens*, 53 U.S. 299 (1851). But legislation such as the Florida Act is plainly an unauthorized incursion into what the authors of the Constitution

realized must be an area wherein national uniformity is essential and only the Federal Government may act. *The Lottawanna*, *supra*.

Since *The Lottawanna*, this Court has repeatedly held that the Admiralty Clause, read in conjunction with the Necessary and Proper Clause,¹² grants to Congress the paramount power to legislate in the maritime field and charges the federal judiciary with the responsibility of defining the general maritime law which is to prevail throughout the country. *The Roanoke*, 189 U. S. 185 (1903); *Southern Pacific Co. v. Jensen*, 244 U. S. 205 (1917); *Chelentis v. Luckenbach S.S. Co.*, 247 U. S. 372 (1918); *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149 (1920); *Washington v. Dawson & Co.*, 264 U. S. 219 (1924); *Garrett v. Moore-McCormack Co.*, 317 U. S. 239 (1942); *Pope & Talbot, Inc. v. Hawn*, 346 U. S. 406 (1953); *Kermarec v. Compagnie Generale*, 358 U. S. 625 (1959); *Kossick v. United Fruit Co.*, 365 U. S. 731 (1961); *Moragne v. States Marine Lines, Inc.* 398 U. S. 375 (1970); and see *Victory Carriers, Inc. v. Law*, 404 U. S. 202, *rehearing den.* 404 U. S. 1064 (1971).

The Florida Act purports, among other things, to provide for inspection of all vessels using Florida ports; to require installation of certain types of vessel equipment; to allow Florida officials to direct the movement of vessels and otherwise interfere with their operation; to establish new causes of action affecting vessels; to change the bases of liability for certain maritime torts from those established by the federal judiciary; to deny limitation of lia-

¹² CONSTITUTION, ARTICLE I, SECTION 8, CLAUSE 18: "The Congress shall have power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof".

bility with respect to pollution damage, and to require proof of financial responsibility, satisfactory to the local authorities, as a condition of access to Florida ports. These provisions plainly constitute an attempt to legislate on substantial matters of general concern within the admiralty jurisdiction. Under the "Admiralty" and the "Necessary and Proper" clauses and the decisions of this Court interpreting them, the State of Florida had no power to enact or enforce such legislation.

II

Congress has enacted legislation specifically covering the same areas as those covered by the Florida Act; that Act would therefore be unconstitutional even if it were not invalid under the Admiralty Clause itself.

As two eminent authorities have put it, "One constitutional truism may be got out of the way at once: Such state legislation is clearly invalid where it actually conflicts with the general maritime law or federal statutes."¹⁸ The Florida Act bristles with provisions conflicting with the general maritime law and federal statutes, and is therefore "clearly invalid" under this rule.

a. The conflict between the Florida Act and federal law governing the maritime tort of water pollution.

With respect to the maritime tort of water pollution itself, the general maritime law provides the underlying principles. Liability is based upon fault; when fault exists, damages, including consequential damages, are recoverable

¹⁸ GILMORE & BLACK, THE LAW OF ADMIRALTY (1957), p. 43.

for injury to property, subject to possible limitation as to amount, in accordance with the Limited Liability Act.¹⁴ In addition, Congress has been legislating to control water pollution since 1886,¹⁵ its latest effort being the Water Quality Improvement Act of 1970 (hereinafter "W.Q.I.A.").¹⁶ The provisions of the Florida Act are everywhere in conflict with those of the general maritime law and the federal statutes relating to water pollution, thus creating an intolerable—and constitutionally impermissible—burden upon international, interstate and intrastate maritime commerce.

b. The conflict between the Florida Act, on the one hand, and federal legislation and international agreements governing the construction, maintenance and inspection of vessels, on the other.

If the Florida Act were held valid, Section 376.08 thereof would subject any domestic or foreign vessel using Florida ports to boarding by a State-appointed Port Manager "prior to its entry into port in order to ascertain the

¹⁴ 46 U.S.C. §§ 183-89. *See, e.g.*, *Fireman's Fund Ins. Co. v. Standard Oil Co.*, 339 F.2d 148 (9th Cir. 1964); *Salaky v. Atlas Barge No. 3*, 208 F.2d 174 (2d Cir. 1953); *California v. The Bournemouth*, 307 F. Supp. 922 (C.D. Cal. 1969); *Petition of New Jersey Barging Corp.*, 163 F. Supp. 925 (S.D.N.Y. 1958).

¹⁵ The New York Harbor Act of 1886, 24 STAT. 329-0.

¹⁶ 33 U.S.C. §§ 1161-75. As of this writing, an extensive revision of W.Q.I.A. is under consideration by Congress. *See* Federal Water Pollution Control Act Amendments of 1971, S.2770, 92nd Cong., 1st Session, passed by the Senate on November 2, 1971, together with H.R. 11896, passed by the House on March 29, 1972. On April 12, 1972 the Senate disagreed with the amendments by the House to S.2770 incorporated in H.R. 11896, appointed conferees, and requested a conference to resolve the differences, 118 CONG. REC. S6021-48 (daily ed. Apr. 12, 1972); the House appointed its conferees on May 1, 1972, 118 CONG. REC. H3770 (daily ed. May 1, 1972).

seaworthiness of the vessel and the presence of containment gear." But federal statutes¹⁷ and regulations issued thereunder,¹⁸ and the International Convention on the Safety of Life at Sea¹⁹ already specify in elaborate detail the standards of construction, equipment, maintenance, and inspection which must be met by all power-driven vessels (other than motor boats, which are otherwise provided for). The provisions of the Florida Act relating to the equipment and seaworthiness of vessels using Florida ports, and to the inspection of vessels by officers of the State, go far beyond any permissible exercise of the police power. They are broad enough to permit the application of criteria conflicting with those established by valid federal legislation and international conventions to which the United States is a party, and are therefore plainly invalid under the Supremacy Clause of the Constitution.²⁰

c. The conflict between the Florida Act and federal statutes relating to limitation of liability.

The Limited Liability Act²¹ provides for limitation of the liability of a shipowner or demise charterer for damage not caused with his "privity or knowledge", to an amount equal to the value of the vessel and the voyage freights. Congress, in enacting W.Q.I.A., created an exception to the Limited Liability Act in respect of claims of the Federal Government for the cost of cleaning up a discharge of oil which the owner or operator of the vessel involved cannot prove was the result of an act of God, an act of war,

¹⁷ 46 U.S.C. §§ 361-436.

¹⁸ 46 C.F.R. §§ 1-199.

¹⁹ TIAS 5780, 16 UST 185, 536 UNTS 27. The Convention has been adopted by all of the important maritime countries, including the United States.

²⁰ CONSTITUTION, ARTICLE 6, CLAUSE 2.

²¹ Note 14, *supra*.

negligence of the United States Government, or an act or omission of a third party. W.Q.I.A. provides for a separate "limitation fund" of \$100 per ton of the vessel's gross tonnage applicable to such clean-up claims.²²

While Congress of course had the power to amend one of its own statutes, i.e., the Limited Liability Act, no state statute is valid if it contravenes that Act.²³ Insofar as the Florida Act purports to impose liability without limitation for the costs of removal of oil and other pollutants discharged from vessels, it conflicts with the Limited Liability Act and is unconstitutional for that reason, among others.

Appellants argue that a general provision of W.Q.I.A.²⁴ saves the Florida Act from unconstitutionality by reason of conflict with maritime law and federal statutes.

On this point the court below rightly said:

"It has long been recognized that Congress is powerless to confer on the states authority to legislate within the admiralty jurisdiction²⁵ . . . and we cannot presume that WQIA was an attempt to do so. There is nothing in the language of the Act which purports to grant any such legislative authority to the states. The statement that Congress did not intend to preclude state imposed liability for oil pollution simply means that the states are free to enforce pollution control measures that are within

²² 33 U.S.C. § 1161(f)(1).

²³ *Butler v. Boston Steamship Co.*, 130 U.S. 527 (1889); *Paladini v. Flink*, 26 F.2d 21 (9 Cir. 1928), *aff'd*, 279 U.S. 59 (1929).

²⁴ "Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil into any waters within such State". 33 U.S.C. § 1161(o)(2).

²⁵ Citing *Knickerbocker Ice Company v. Stewart*, 253 U.S. 149 (1920); *The Lottawanna*, 88 U.S. (21 Wall.) 558 (1875); *The Steamer St. Lawrence*, 66 U.S. (1 Black) 522 (1862).

their constitutional prerogative." 335 F. Supp. 1241, 1249.

Section 376.19 of the Florida Act indeed indicates an appreciation, however misplaced, of the need for some measure of uniformity;²⁶ Florida's mistake is its assumption that it is enough if there is state-wide uniformity, whereas it is in fact constitutionally required that uniformity in areas of maritime law of general concern must prevail throughout the United States. The logic which impelled the Florida legislature to include this provision is the same as that which resulted in the constitutional provision that only Congress may legislate with respect to maritime matters which are not of purely local concern. It is unconstitutional for Florida, or any other state or political subdivision thereof, to enact its own—and conflicting—legislation in this field.

III

The Act for the Extension of Admiralty Jurisdiction was a valid exercise by Congress of its Constitutional power to legislate in the maritime field.

Although Rule 40.1(d)(2) of this Court provides that "the brief may not raise additional questions", Appellant's Brief, for the first time, questions the constitutionality of the Act for the Extension of Admiralty Jurisdiction²⁷

²⁶ The section provides:

"However, in order to avoid unnecessary duplication, no county, municipality, or other political subdivision of the state may adopt or establish a similar program of licensing and fees for the accomplishment of the purposes of this chapter".

²⁷ 46 U.S.C. § 740.

(hereinafter, "Admiralty Extension Act"). The Brief *Amicus Curiae* filed by the Attorney General of Georgia likewise questions the validity of that Act.

Even if the Admiralty Extension Act were declared unconstitutional (and the Association is convinced that it should not be), such a decision would not validate the Florida Act. At most it would entitle the states to legislate with respect to pollution damage caused by vessels to shoreside property. The Florida Act purports to do much more; it seeks to regulate liability for pollution of waters within the admiralty and maritime jurisdiction of the United States, and for damage to vessels employed on those waters, caused by discharges of oil and other substances from other vessels.

Bills to accomplish the reforms ultimately effected by the Admiralty Extension Act had long been sponsored by both the Maritime Law Association and the American Bar Association. See H. R. Report No. 1523, 80th Congress, 2d Session, and letter of Honorable W. J. Kenney, Acting Secretary of the Navy, annexed thereto, 1948 AMC 1503, 1505-6.

Prior to passage of the Admiralty Extension Act the admiralty and maritime jurisdiction of the Federal courts in tort cases was in most instances limited to injuries consummated on navigable waters; with certain exceptions hereinafter noted, injuries to persons or property on land (including bridges, piers and other extensions of the land) caused by vessels operating in navigable waters were not considered within the admiralty jurisdiction.

This restriction encouraged multiplicity of suits and sometimes led to highly inequitable results. Thus, if a vessel caused injury to a shore structure such as a drawbridge, or to persons thereon, a federal district court could not entertain an admiralty suit for the resulting damages, *Cleveland Terminal and Valley R.R. Co. v. Cleveland S.S.*

Co., 208 U. S. 316 (1908); *The Troy*, 208 U. S. 321 (1908); *Martin v. West*, 222 U. S. 191 (1911). On the one hand, admiralty had jurisdiction of a claim by the shipowner for damage to his vessel caused by negligent operation of the bridge, since the tort to the vessel was consummated on navigable waters. In such a case, the shipowner would normally invoke the admiralty jurisdiction, so that in the event of a finding of mutual fault he could obtain a partial recovery under the more enlightened admiralty rule whereunder contributory negligence does not bar a recovery, but merely diminishes the amount thereof. The bridge owner, on the other hand, had no right to file a cross-libel for his damages in the admiralty suit, but was obliged to bring a separate action in a court of common law jurisdiction, where he would be barred from recovering under the common law rule if contributory negligence were found.

A similarly anomalous result could occur in the case of a collision between a vessel and a land structure caused solely by the fault of a compulsory pilot. Before the Admiralty Extension Act, the owner of the land structure had no remedy (except against the pilot), because a compulsory pilot is not the agent or servant of the shipowner, *Homer Ramsdell Transp. Co. v. Compagnie Generale*, 182 U. S. 406, 416 (1901), and a court of common law jurisdiction is powerless to entertain a civil proceeding *in rem* against a vessel. *The Moses Taylor*, 71 U. S. 411, 430-1 (1866). Now, however, where injury is caused by a vessel to persons or property ashore as a result of the fault of a compulsory pilot, the Admiralty Extension Act permits the injured parties to invoke the admiralty jurisdiction and proceed *in rem* against the offending vessel.

This Court has repeatedly held that the authors of the Constitution, in extending the federal judicial power to "all cases of admiralty and maritime jurisdiction", recog-

nized the existence of a system of maritime law and intended to place both the substantive and procedural features of that law under national control, because of its intimate relation to navigation and to interstate and foreign commerce. *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 386 (1924). This Court has also repeatedly held that the authors of the Constitution could never have intended that the law should remain stagnant; it has recognized that the maritime law existing at the time the Constitution was adopted became the law of the United States, "subject to power in Congress to alter, qualify or supplement it as experience or changing conditions might require". *Panama R.R. Co. v. Johnson*, *supra*, holding the Jones Act ²⁸ constitutional; *The Thomas Barlum*, 293 U.S. 21, 23 (1934), upholding the constitutionality of the Preferred Ship Mortgage Act; ²⁹ *Crowell v. Benson*, 285 U.S. 22, 39 (1932), holding the Longshoremen's and Harborworkers' Compensation Act ³⁰ constitutional. See, also, *Providence and N.Y. S.S. Co. v. Hill Mfg. Co.*, 109 U.S. 578 (1883), declaring the Fire Statute ³¹ constitutional; *The Hamilton*, 207 U.S. 398 (1907), relating to the constitutionality of the Limited Liability Act,³² and *Victory Carriers, Inc. v. Law*, 404 U.S. 202, *rehearing den.* 404 U.S. 1064 (1971), wherein this Court recognized the power of Congress to extend the jurisdiction of the federal courts beyond the historic boundaries of the maritime law.

As stated, even before passage of the Admiralty Extension Act the jurisdiction of admiralty in tort cases was

²⁸ 46 U.S.C. § 688.

²⁹ 46 U.S.C. §§ 911-84.

³⁰ 33 U.S.C. §§ 901-50.

³¹ 46 U.S.C. § 182.

³² Note 14, *supra*.

not always limited to torts consummated on navigable waters. Thus, in cases falling under the Limited Liability Act, the federal district courts, by virtue of their admiralty jurisdiction, had power to entertain claims for injuries caused by vessels to persons and property ashore. *Richardson v. Harmon*, 222 U.S. 96 (1911). Independently of the Admiralty Extension Act, a suit under the Jones Act, which could be brought either in admiralty or as an ordinary "civil" suit in a federal district court or a state court of general jurisdiction, would lie even if the injury occurred ashore. *O'Donnell v. Great Lakes & Dock Co.*, 318 U.S. 36 (1943). Long before passage of the Admiralty Extension Act, damage caused by a vessel to an aid to navigation was within the admiralty jurisdiction, even though the navigational aid was affixed to the land. *The Blackheath*, 195 U.S. 361 (1904).

As noted by Mr. Justice White in *Victory Carriers v. Law*, *supra*, the Admiralty Extension Act has already withstood several attacks in the lower courts. See *United States v. Matson Navigation Co.*, 201 F.2d 610, 614-16 (9th Circuit 1953); *American Bridge Co. v. The Gloria O*, 98 F. Supp. 71, 73-74 (E.D.N.Y. 1951); *Fematt v. City of Los Angeles*, 196 F. Supp. 89, 93 (S.D. Cal. 1961). See also Fauver, *The Extension of Admiralty Jurisdiction to Include Maritime Torts*, 27 Geo. L.J. 252 (1949); Bergren, *Effects of Recent Legislation Upon the Admiralty Law*, 17 Geo. Wash. L.Rev. 353 (1949). To hold otherwise would be to resurrect the evils the Act was designed to cure, and has effectively cured, during the 24 years it has been in force.

Conclusion

The Florida Act contravenes a number of other provisions of the United States Constitution. However, the interest of the Association lies specifically in upholding the principles of national uniformity and harmony of the mari-

time law required by the Admiralty Clause, and any discussion of the remaining constitutional objections will be left to others.

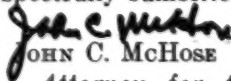
If there were a reversal of the decision below, it would be only a matter of time before each of the coastal states would enact its own statutes, covering not only the area of water pollution, but other areas of general concern in the admiralty. The various state water pollution statutes already enacted are by no means harmonious, and it could scarcely be expected that state legislation in other areas of maritime law would be any less free of conflicting provisions. The result would be an impossible tangle of differing laws and an intolerable burden on the maritime commerce of the United States.

The Association realizes that all levels of Government have important roles to play in the developing concern with ecological problems, which the members of the Association share with all responsible citizens. However, the position of the State of Florida is, in effect, to usurp powers which can constitutionally—and practically—be exercised by the Federal Government alone.

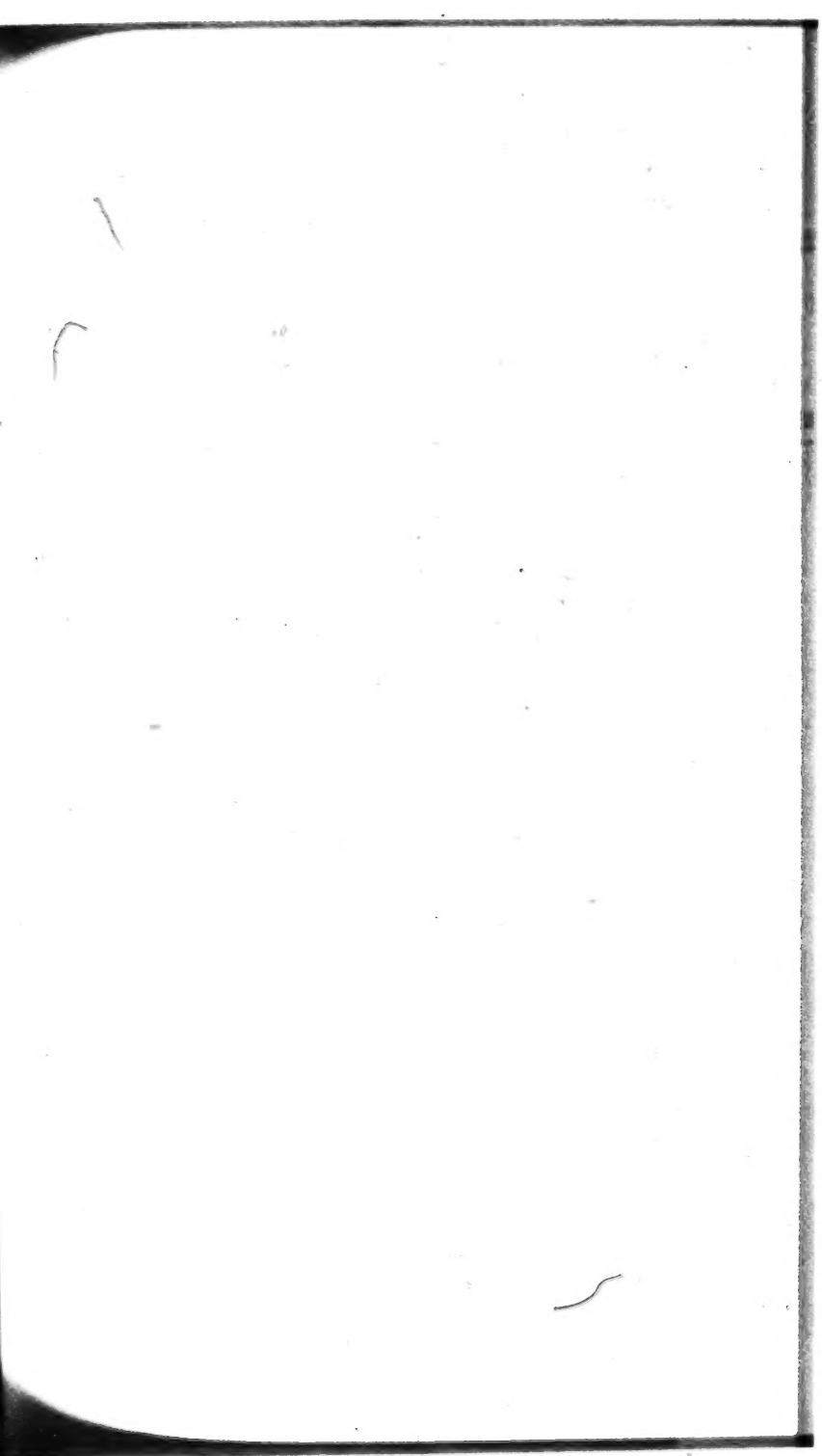
This Honorable Court should therefore affirm the decision below.

July 26, 1972.

Respectfully submitted,


JOHN C. McHOSE

*Attorney for the Maritime Law
Association of the United States,
Amicus Curiae.*



COPY

in the
Supreme Court
of the
United States

OCTOBER TERM, 1972

No. 71-1082

REUBIN O'D. ASKEW, et al.,

Appellants,

vs.

THE AMERICAN WATERWAYS
OPERATORS, INC., et al.,

Appellees.

On Appeal from the United States District Court
for the Middle District of Florida

BRIEF OF APPELLEES

LeROY COLLINS,
Of Counsel
Ervin, Varn, Jacobs
& Odom

JOSEPH C. JACOBS
of the law firm of
Ervin, Varn, Jacobs & Odom
Post Office Box 1170
Tallahassee, Florida 32302

and

JOHN B. CHANDLER, JR.,
Rogers, Towers, Bailey, Jones & Gay
Florida Title Building
Jacksonville, Florida 32202

and

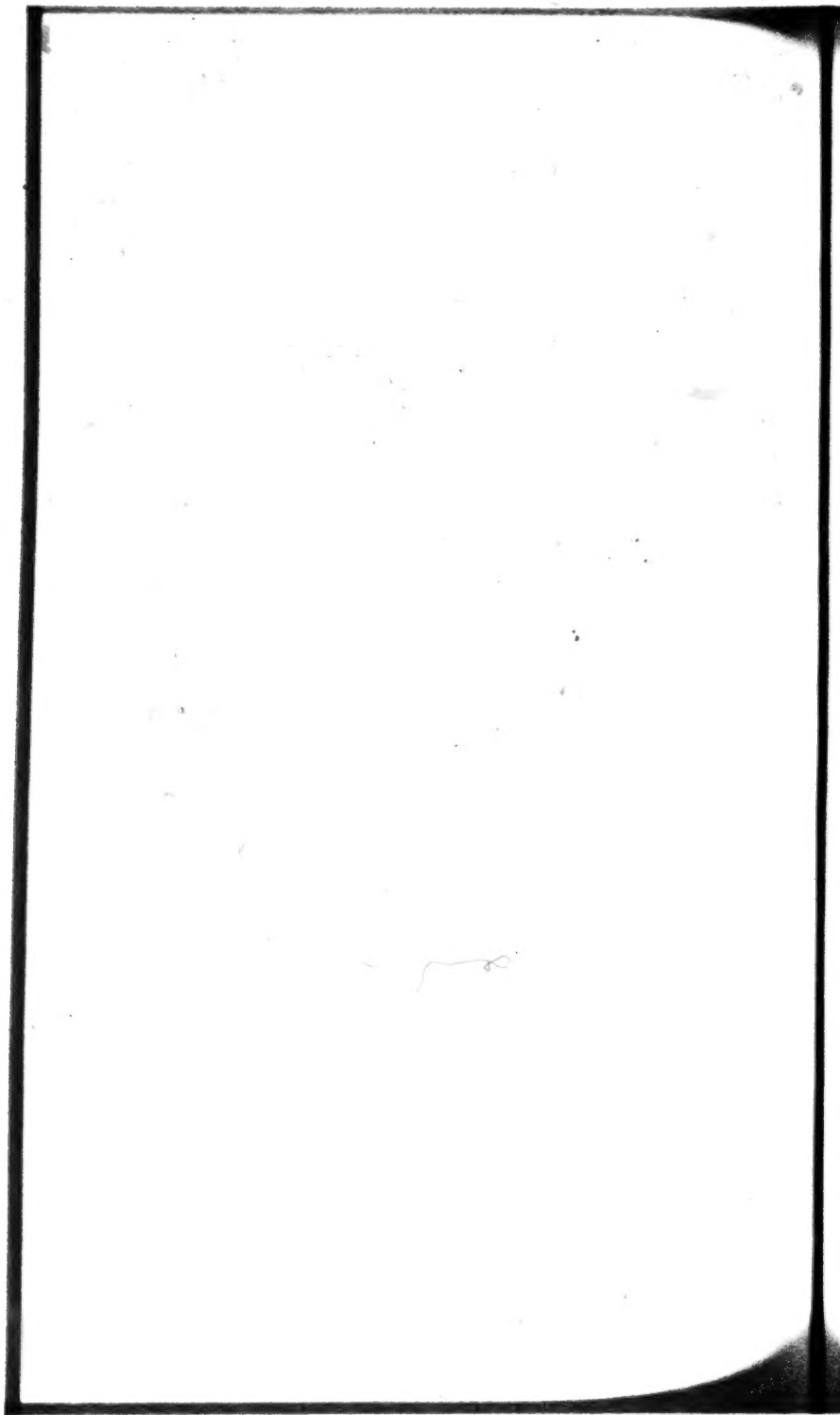
STEWART D. ALLEN
Sunset House
5825 Sunset Drive
South Miami, Florida

Attorneys for Appellees

Supreme Court, U. S.
FILED

AUG 14 1972

MICHAEL RODIX, JR., CLERK



BLEED THROUGH POOR COPY

SUBJECT INDEX

	Page
REPORT OF OPINION, JURISDICTION AND STATUTES INVOLVED	2
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	10

ARGUMENT:

Point I — The District Court correctly held un- constitutional Chapter 70-224, Laws of Florida, published as Chapter 376, Florida Statutes (1970), as an attempt to legislate substantive maritime law which, under Article III, Sec- tion 2, Clause 3, United States Constitution, is exclusively within the federal domain	11
--	----

A. Constitutional history	11
B. Judicial evolution	16
C. The law relied on by the lower court	23
D. The law applied to the case at bar	33

II

INDEX (cont.)

Point II — Chapter 70-224, Laws of Florida, is unconstitutional as it is in direct conflict with federal statutes in an area which has been preempted by federal statutes 36

A. The entire body of federal admiralty law preempts the field 36

B. Police power is not applicable 55

Point III — Chapter 70-224, Laws of Florida, violates the Commerce Clause of the United States Constitution as the power of Congress to regulate foreign and interstate commerce is supreme 59

A. The Florida Act violates the Commerce Clause of the United States Constitution as it imposes an undue burden on interstate and foreign commerce 63

B. The Florida Act violates the Commerce Clause of the United States Constitution as the Florida Act relates to a "national" problem requiring uniformity 70

CONCLUSION 74

III

TABLE OF AUTHORITIES

Cases	Page
American Bridge Co. v. The Gloria O, 98 F.Supp. 71 (E.D.N.Y. 1951)	49
Arizona v. California, 283 U.S. 423 (1931)	75
Baltimore and Ohio Railroads Co. v. Maryland, 21 Wall. 456 (1875)	22
Belfast v. Boon, 7 Wall. 624 (1869)	19
Bethlehem Steel Co. v. New York Labor Relations Board, 330 U.S. 767 (1947)	40, 55
Bibb v. Navajo Freight Lines, 359 U.S. 530 (1959)	63, 71
Board of Trustees of the University of Illinois v. The United States of America, 289 U.S. 48 (1923)	62
British Transport Co. v. United States, 354 U.S. 129 (1957)	46
Brotherhood of Locomotive Firemen & Enginemen v. Chicago R.I. & P.R., 393 U.S. 192 (1968)	64, 65, 70
Calbeck v. Travelers Ins. Co., 370 U.S. 114 (1962)	32

IV

TABLE OF AUTHORITIES (cont.)

Case	Page
California v. S.S. Bournemouth, 307 F.Supp. 922 (DC 1969) and 318 F.Supp. 839, 10 A.L.R.Fed. (1970) _____	50
California v. Thompson, 313 U.S. 109 (1940) _____	64
Chevron Oil Co. v. Huson, — U.S. —, 30 L.Ed.2d 296 (1971) _____	29A
Cooley v. Board of Wardens, 12 How. 299, 12 L.Ed. 996 (1851) _____	55, 64, 71
The Daniel Ball, 10 Wall. 557 (1870) _____	59
DeBardeleben Coal Corp. v. Henderson, 142 F.2d 481 (1944) _____	32
Detroit Trust Co. v. Steamer "Thomas Barlum", 293 U.S. 21 (1934) _____	23
Fematt v. City of Los Angeles, 196 F.Supp. 89 (S.D.Cal. 1961) _____	49
Ferguson v. Skrupa, 372 U.S. 726 (1963) _____	75
Florida Lime and Avocado Growers v. Paul, 373 U.S. 132 (1963) _____	38, 39, 40, 51, 71

TABLE OF AUTHORITIES (cont.)

Case	Page
In Re Garnett, 141 U.S. 1 (1891)	22
The Genesee Chief v. Fitzhugh, 12 How. 443 (1851)	47, 59
Gibbons v. Ogden, 9 Wheat. 1 (1824)	59, 62, 70
Gilman v. Philadelphia, 3 Wall. 724 (1865)	60
Gutierrez v. Waterman Steamship Corp., 373 U.S. 206 (1963)	49
Hall v. DeCuir, 5 Otto 485 (1877)	59, 63
Henderson v. Wickham, 92 U.S. 259 (1876)	60
Huron Portland Cement Co. v. Detroit, 362 U.S. 40	56, 64, 70
Jackson v. The Steamboat Magnolia, 20 How. 296, 15 L.Ed. 909 (1858)	21
Just v. Chambers, 312 U.S. 383 (1940)	29

VI

TABLE OF AUTHORITIES (cont.)

Case	Page
Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920)	25, 71
Lord v. Goodall, Nelson & Perkins Steamship Co., 12 Otto 541 (1880)	59, 60, 61
The Lottawanna, 21 Wall. 558, 22 L.Ed. 654 (1875)	53
McCray v. United States, 195 U.S. 27 (1904)	75
New England Marine Ins. Co. v. Dunham, 11 Wall. 1 (1871)	19
Northern States Power Co. v. State of Minnesota, 447 F.2d 1143 (8CA 1971), aff'd — U.S. —, 31 L.Ed.2d 569, 92 S.Ct. — (1972)	36, 39, 57, 58
Norris v. City of Boston, 7 How. 283 (1849)	59, 70
Norwich and New York Transportation Co. v. Wright, 13 Wall. 104 (1871)	46
O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36 (1943)	21, 48
Parker v. Brown, 317 U.S. 341 (1942)	64

VII

TABLE OF AUTHORITIES (cont.)

Case	Page
Petition of New Jersey Barging Corp., 168 F.Supp. 925 (1958)	50, 52
Philadelphia & S. Mail SS. Co. v. Pennsylvania, 122 U.S. 326 (1887)	71
Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)	65, 69, 71
Providence and N.Y. SS. Co. v. Hill Mfg. Co., 109 U.S. 578, 27 L.Ed. 1038 (1883)	46
Ramsay v. Allegre, 12 Wheat. 611 (1827)	20, 47
Robbins v. Shelby, 120 U.S. 489 (1887)	71
Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352 (1969)	35, 49
Romero v. International Terminal Operating Co., 358 U.S. 354 (1959)	53
Simpson v. Shepherd, 230 U.S. 352 (1912)	70, 71
South Carolina Highway Dept. v. Barnwill Bros., 303 U.S. 177 (1938)	64, 70

VIII

TABLE OF AUTHORITIES (cont.)

Case	Page
Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945) _____	63, 71
Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917) _____	23
Standard Dredging Corp. v. Murphy, 319 U.S. 306 (1943) _____	29, 30
State Board of Ins. v. Todd Shipyard Corp., 370 U.S. 451 (1962) _____	33
Toomer v. Witsell, 334 U.S. 385 (1948) _____	64
United States v. Matson Navigation Co., 201 F.2d 610 (CA9 1953) _____	49
United States v. O'Brien, 391 U.S. 367 (1968) _____	74
United States v. Pabst Brewing Co., 384 U.S. 546 (1966) _____	75
Veazie v. Moor, 14 How. 568 (1852) _____	59, 61
Victory Carriers v. Law, — U.S. —, 30 L.Ed.2d 383, 92 S.Ct. — (1971) —	32, 48

IX

TABLE OF AUTHORITIES (cont.)

Case	Page
Wacirema Operating Co. v. Johnson, 396 U.S. 212 (1969) _____	49
Waring, et al. v. Clarke, 5 How. 441 (1847) _____	21, 47
Washington v. Dawson, 264 U.S. 219 (1923) _____	26
Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310 (1955) _____	43
Wyandotte Trans. Co. v. United States, 389 U.S. 191 (1967) _____	46, 50

UNITED STATES CONSTITUTION

Article I, Section 8 _____	34, 63, 70
Article III, Section 2 _____	34, 42
Article VI _____	37

STATUTES — FEDERAL

28 U.S.C. 1333 _____	48
33 U.S.C. Section 409, 414, 419 (Fed. Wreck Stat.) —	39, 50, 54

TABLE OF AUTHORITIES (cont.)

	Page
Section 901-50 (1958), 44 Stat. 1426-27, 1429, 1431-32, 1434-46 (1929), (Longshoremen's and Harborworkers' Compensation Act) _____	27
Section 1161(g) _____	67
Section 1161(o) _____	39, 42
1 Stat. 27 (1789) _____	20
1 Stat. 55 (1789) _____	20
1 Stat. 131 (1790) _____	20, 59
Section 1161(o)(1) _____	47, 54
Section 1161(o)(2) _____	53, 54
Section 1161(o)(3) _____	54
Section 1161(p) _____	68, 72
 43 U.S.C. Sections 1131, et seq., 67 Stat. 462 (Outer Continental Shelf Lands Act) _____	 35
 46 U.S.C. Section 181-189, 9 Stat. 635 (Limitation of Liability Act) _____	 39, 43, 54, 67
Section 740 (Admiralty Extension Act) ..	39, 49, 50, 54
Section 761, et seq. (Death on the High Seas Act) _____	35

XI

TABLE OF AUTHORITIES (cont.)

STATUTES — STATE

	Page
Chapter 70-224, Laws of Florida, 1970	78
Chapter 376, Florida Statutes, 1970	51
Section 376.021 (5)	67
Section 376.021 (6)	33
Section 376.07	63, 73
Section 376.07 (2) (a)	34, 63, 70
Section 376.08 (2)	34
Section 376.11	67
Section 376.12	34, 62, 66, 67, 72
Section 376.14	66, 67
Section 376.15	51
Section 376.16	50

LAW REVIEW ARTICLES

Avins, Absolute Liability for Oil Spillage, 36 Brooklyn Law Review 359 (1970)	18
--	----

BOOKS

Antieau, Modern Constitutional Law, Vol. 2 (1969)	17
Baer, Admiralty Law and The Supreme Court (1969)	44, 47

XII

TABLE OF AUTHORITIES (cont.)

	Page
Benedict, The Law of American Admiralty (6th Ed. 1940) Vol. 1	17
Farrand, The Records of the Federal Convention of 1787, Vol. 2 (1966)	11, 12, 15, 16
Farrand, The Records of the Federal Convention of 1787, Vol. 3 (1966)	12, 13, 14
The Federalist #80 (Hamilton) from McLean's Edition, New York, 1788	15, 16
Gilmore and Black, The Law of Admiralty (1957)	18, 44, 46
Prosser, Torts, 533-541 (3rd Ed. 1964)	68
Prosser, Torts, Sec. 78 (3rd Ed. 1964)	68

OTHER STATE STATUTES

Alaska, Statutes Title 46, Ch. 05 (1968, 1970)	77
Maine Title 38:	
Section 541-557 (1970)	77
Section 546(4) (a)	73
Massachusetts:	
St. 827, Section 50B	72
St. 837, Section 4.0	73

XIII

TABLE OF AUTHORITIES (cont.)

	Page
Act 167, Public Acts of 1970	73
Ann. Laws of Mass., Ch. 21, Section 27(10), 50-52.....	77
Michigan:	
Section 3-533 (209), C210	73
Water Pollution Control Act of 1970, Act 167, 1970	77
Washington:	
RCW 88.8, 11	73
RCW 90.48.315, et seq.	77

OTHER AUTHORITIES

2 C.J.S. Admiralty §2b	19
2 Am.Jur.2d Admiralty §7	19
16 Am.Jur.2d Constitutional Law §259-262	55
Rule F of the United States Supreme Court, Sup- plemental Rules for Certain Admiralty and Maritime Claims	44

BLEED THROUGH POOR COPY

in the
Supreme Court
of the
United States

OCTOBER TERM, 1972

No. 71-1082

REUBIN O'D. ASKEW, et al.,

Appellants,

vs.

THE AMERICAN WATERWAYS
OPERATORS, INC., et al.,

Appellees.

On Appeal from the United States District Court
for the Middle District of Florida

BRIEF OF APPELLEES

THE AMERICAN WATERWAYS OPERATORS, INC., a Delaware corporation; GULF ATLANTIC TOWING CORPORATION, a Florida corporation; GLIDDEN-DURKEE, a division of SCM, CORPORATION, a New York corporation; DIXIE CARRIERS INC., a Delaware corporation; OIL TRANSPORT COMPANY, INCORPORATED, a Louisiana corporation; NATIONAL MARINE SERVICE INC., a

Delaware corporation; THE REVILO CORPORATION, a Florida corporation; EASTERN SEABOARD PETROLEUM COMPANY, INC., a Florida corporation; NILO BARGE LINE, INC., a Delaware corporation; STEUART TRANSPORTATION COMPANY, a Delaware corporation; INTERSTATE OIL TRANSPORT COMPANY, a Delaware corporation; FEDERAL BARGE LINES, INC., a Delaware corporation; and GULF CANAL LINES, INC., a Texas corporation; and INGRAM OCEAN SYSTEM, INC., a Delaware corporation, all authorized to do business in the State of Florida,

**REPORT OF OPINION,
JURISDICTION AND STATUTES INVOLVED**

Pursuant to Rule 40 Supreme Court Rules and Paragraph 3 thereof, Appellees adopt Appellants Report of Opinion, Jurisdiction and Statutes involved.

QUESTIONS PRESENTED

I.

WHETHER THE DISTRICT COURT ERRED IN HOLDING UNCONSTITUTIONAL CHAPTER 70-224, LAWS OF FLORIDA, PUBLISHED AS CHAPTER 376, FLORIDA STATUTES (1970), AS AN ATTEMPT TO LEGISLATE SUBSTANTIVE MARITIME LAW WHICH, UNDER ARTICLE III, SECTION 2, CLAUSE 3, UNITED STATES CONSTITUTION, IS EXCLUSIVELY WITHIN THE FEDERAL DOMAIN.

II.

WHETHER CHAPTER 70-224, LAWS OF FLORIDA, IS UNCONSTITUTIONAL AS IT IS IN DIRECT CONFLICT WITH FEDERAL STATUTES IN AN AREA WHICH HAS BEEN PREEMPTED BY THE FEDERAL STATUTES.

III.

WHETHER CHAPTER 70-224, LAWS OF FLORIDA, IS UNCONSTITUTIONAL AND VIOLATIVE OF THE COMMERCE CLAUSE SINCE IT SEEKS TO REGULATE FOREIGN AND INTERSTATE COMMERCE, A QUESTION NOT DEALT WITH BY THE LOWER COURT.

STATEMENT OF THE CASE

The opinion of the court below provides a clear and concise statement of the case and the factual background relating thereto. Excluding citations of authority and material not pertinent to this appeal, the lower court found as follows:

"During the 1970 session the Florida Legislature passed the 'Oil Spill Prevention and Pollution Control Act' . . . The Act imposes unlimited liability without fault upon virtually any vessel which discharges oil or any other pollutant while destined for or leaving any Florida port. On-shore and offshore terminal facilities are subject to the same liability. The Act requires every

owner or operator of a vessel using a Florida port or a terminal facility to pay whatever clean up costs or damages may result from the discharge of pollutants and to maintain satisfactory evidence of financial responsibility to satisfy such liability. The Department of Natural Resources (State) is empowered to require any vessel transporting a pollutant in state waters to be equipped with specified containment gear and a crew trained in its use. Prior to entering a Florida port, every vessel is subject to inspection by the port manager (State) to determine the presence of the required containment gear and the seaworthiness of the ship. He is required to notify all other ports in the state of any vessel refused entry to his port.

"Plaintiffs and intervenors (Appellees) include merchant shippers whose vessels use Florida ports in the course of transporting goods in foreign and interstate commerce; world shipping associations who insure three-fourths of the ocean-going tonnage against, among other things, liability for oil spillage; a substantial portion of the barge and towing industry operating along the Florida coast; and owners of oil terminal facilities located in Florida ports. They have challenged the validity of the Florida Act on several federal constitutional grounds. . . .

"The maritime law of the United States has evolved under Article 3, and Section 2, of the Constitution which extends the judicial power of

the United States 'to all Cases of admiralty and maritime jurisdiction.' . . . Maritime law governs virtually every facet of the shipping industry from the design and construction of vessels to the regulation of their day to day operations and the transactions in which they engage. It comprises traditional admiralty rules and concepts found initially in the European authorities. These rules and concepts have been augmented from time to time by the federal judiciary to accommodate needs distinctive to this nation. Further changes in the corpus of maritime law have been effected by a variety of congressional enactments and administrative regulations. One of these congressional enactments is the Water Quality Improvement Act of 1970 which became law a few months (April 3, 1970) prior to the effective date of the Florida Act (July 1, 1970). W.Q.I.A. provides plaintiffs with tangible evidence that the Florida Act is an unconstitutional intrusion into the federal maritime domain.

"The W.Q.I.A. reinforces the national anti-water pollution policy. In this act Congress declared that there should be no discharge of oil into or upon the navigable waters and shorelines of the United States. The owner or operator of a vessel or an onshore or offshore facility is subject to limited liability without fault for the costs expended by the government in cleaning up an oil spill. Where the spillage results from willful negligence or misconduct, however, liability for such costs can be unlimited. Evidence

of financial responsibility sufficient to cover its potential liability must be given by any vessel of 300 gross tons or more that uses the navigable waters of the United States. Additionally, the President is authorized to issue regulations requiring, among other things, that vessels maintain oil spill prevention equipment and be subject to boarding for inspection purposes at any time.

"In adopting W.Q.I.A. Congress anticipated that all hazardous substances, in addition to oil, capable of polluting navigable waters would be subject to similar legislative treatment. W.Q.I.A. required the President to promulgate regulations defining such hazardous substances and establishing methods and means for their removal. . .

"That the Florida Act constituted unlawful intrusion into the exclusive federal admiralty domain is apparent when one observes the extent to which that act would change substantive maritime law. The most obvious changes would be in the liability now imposed by W.Q.I.A. and maritime rules on shippers and the operators of on-shore and offshore facilities.

"While both W.Q.I.A. and the Florida Act subject vessels and onshore and offshore facilities to strict liability for cleanup costs, the latter imposes a far greater measure of responsibility. For example, W.Q.I.A. would excuse a shipper who demonstrates that the oil spill was caused by

act of God, an act of war, or the act or omission of a third party. The Florida Act recognizes none of these defenses to a claim by the state for cleanup costs. The state is entitled to judgment simply by pleading and proving 'the fact of the prohibited discharge.' Moreover, the amount of the recovery would be unlimited; whereas W.Q.I.A. would place a limit on exposure, as we have previously noted.

"There is perhaps an even greater contrast between maritime law and the Florida Act in compensating state or private interests for property damage, as distinguished from cleanup costs. W.Q.I.A. creates responsibility for cleanup costs only and leaves undisturbed the remedies available under maritime law for private injury caused by oil spillage or other pollution. The federal courts have long considered oil pollution as a maritime tort for which damages may be awarded. Compensation is recoverable for injury to property and allowances have even been made for consequential damages. . . .

"The recovery of damages in such cases is predicated on proof of negligence or unseaworthiness. . . .

"Under the Florida Act, however, liability without fault is the foundation for 'damage incurred by the state and for damage resulting from injury to others,' just as it is in the case of cleanup costs. By substituting absolute liabil-

ity for proof of negligence or unseaworthiness as a condition to unlimited recovery, the Florida Act, if valid, would materially change the substantive maritime law governing the disposition of claims arising from the pollution of coastal waters.

"It is well settled that state legislation is invalid where it is in contravention with general admiralty rules or congressional enactments in the maritime field. . . .

* * *

" . . . If applied to the plaintiffs and intervenors (Appellees) in this case, the Florida Act would effect—in the words of *Jensen*—the 'destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded.

"This is not a situation in which a state legislature has sought to act in an area of purely local concern and its enactment is no real encroachment on federal interests. . . .

* * *

"For the foregoing reasons we conclude that the Florida Act in question cannot constitutionally be applied to the plaintiffs and intervenors and to the activities in which they engage. . . .

* * *

"In the Florida Act there are no provisions which, though standing by themselves might be

considered unobjectionable, are not so interwoven in purpose and scheme with the invalid provisions of the Act as to permit the operation of the severability clause. . . . The provisions that do not directly frustrate the federal maritime law are so few that, considered together, they would not comprise a coherent legislative scheme. Accordingly, the Act in its entirety must fall." (A. 39-44)

* * *

In light of these findings, the lower court concluded that by the Florida Act the state had sought to legislate substantive maritime law which, under the United States Constitution, was exclusively in the federal domain. Thus, the contention that the Act violated the Commerce Clause and the Due Process and Equal Protection Clauses of the Fourteenth Amendment were not considered.

SUMMARY OF ARGUMENT

I.

The history of the constitutional convention reveals that the founders of our present system of government recognized the need for a harmonious body of maritime laws to be applied and interpreted with uniformity throughout the country. The United States Supreme Court has, through its opinions and rules, developed this concept into a system in which this necessary uniformity is protected by the exclusive congressional power to pass admiralty legislation and the border line between state and admiralty jurisdiction is defined by this congressional legislation and judicial opinion. It was out of this system that the decisions relied on the court below evolved, and it is because the Florida Act clearly flies in the face of this system that it is unconstitutional.

II.

The concept of statutory preemption is a limitation on the alleged police power invoked by Florida as justification for the State Act. Due to the Supremacy Clause in the United States Constitution, the entire body of maritime law is superior to any similar state statute and especially to the Florida Statute which is a direct affront to many basic maritime concepts. The Water Quality Improvement Act (W.Q.I.A.) (See pages 75-90) and regulatory procedures authorized and activated thereunder complement and implement the prior maritime statutes and thus create such a comprehensive statutory and regulatory scheme that there is no room for paralleling and conflicting state action.

III.

The Florida Act is a direct attempt to regulate an industry engaged largely in interstate and foreign commerce. Congress, via the Commerce Clause, has supreme authority to legislate in the field of foreign and interstate commerce. Contrary to the Commerce Clause power, Florida has passed legislation which imposes an undue burden on interstate and foreign commerce. The regulation of the shipping industry is a national problem which requires uniformity. To allow Florida (and thus other states) to legislate in this area is to destroy this uniformity, and this is a violation of the Commerce Clause.

ARGUMENT

I.

THE DISTRICT COURT CORRECTLY HELD UNCONSTITUTIONAL CHAPTER 70-224, LAWS OF FLORIDA, PUBLISHED AS CHAPTER 376, FLORIDA STATUTES (1970), AS AN ATTEMPT TO LEGISLATE SUBSTANTIVE MARITIME LAW WHICH, UNDER ARTICLE III, SECTION 2, CLAUSE 3, UNITED STATES CONSTITUTION, IS EXCLUSIVELY WITHIN THE FEDERAL DOMAIN.

A. Constitutional History

One source of aggravation which led the American colonies to revolt against England was the requirement that the colonies could ship only in English bottoms. Far-
rand, **The Records of the Federal Convention of 1787,**

Vol. 3, p. 303 (1966). When the quest for independence was successfully completed and the time came to formulate a replacement form of government for the much too loose Articles of Confederation, the concern over admiralty law was still fresh in the minds of those who attended the Constitutional Convention. See Farrand, Vol. 3, pp. 164-167, 211, 214. The prime task of that convention was to chart areas of power and responsibility for a new national convention. The members of the convention realized that in certain areas, unified action and uniform laws would obviously be required. Thus, provision was made for a uniform system of coinage, weights and measures. Likewise, the powers of determining war and peace, creating a postal system and receiving ambassadors were fixed at the national level. The subject of admiralty and maritime law was also deemed firmly established within this category.

One need only peruse the records of the convention to see that the drafters of the Constitution never questioned the need for uniformity of maritime laws. The only real questions concerning admiralty which arose during the convention were whether the uniform system of maritime laws would be promulgated by a simple majority of Congress or whether maritime laws could be passed only with a two-thirds vote of both houses of Congress, which would insure uniformity of consent as well as uniformity of laws.

Alexander Hamilton explained the situation to the New York Convention on June 20, 1788, in the following manner:

"In order that the committee may understand clearly the principles on which the general Convention acted, I think it necessary to explain

some preliminary circumstances. Sir, the natural situation of this country seems to divide its interests into different classes. There are navigating and non-navigating states. The Northern are properly navigating states: the Southern appear to possess neither the means nor the spirit of navigation. This difference of situation naturally produces a dissimilarity of interests and views respecting foreign commerce. It was the interest of the Northern States that there should be no restraints on their navigation, and they should have full power, by a majority in Congress, to make commercial regulations in favor of their own, and in restraint of the navigation of foreigners. The Southern States wish to impose a restraint on the Northern, by requiring that two thirds in Congress should be requisite to pass an act in regulation of commerce. They were apprehensive that the restraints of a navigation law would discourage foreigners, and, by obliging them to employ the shipping of the Northern States, would probably enhance their freight. This being the case, they insisted strenuously on having this provision ingrafted in the Constitution, and the Northern States were as anxious in opposing it. On the other hand, the small states, seeing themselves embraced by the Confederation upon equal terms, wished to retain the advantages which they already possessed. The large states, on the contrary, thought it improper that Rhode Island and Delaware should enjoy an equal suffrage with themselves. From these sources a delicate and difficult contest arose. It became necessary, therefore, to compromise, or the Con-

vention must have dissolved without effecting any thing. Would it have been wise and prudent in that body, in this critical situation, to have deserted their country? No. Every man who hears me, every wise man in the United States, would have condemned them. The Convention were obliged to appoint a committee for accommodation. In this committee, the arrangement was formed as it now stands, and their report was accepted. It was a delicate point, and it was necessary that all parties should be indulged. Gentlemen will see that, if there had not been a unanimity, nothing could have been done; for the Convention had no power to establish, but only to recommend, a government. Any other system would have been impracticable. Let a convention be called to-morrow; let them meet twenty times, —nay, twenty thousand times; they will have the same difficulties to encounter, the same clashing interests to reconcile. . . ." Farrand, Vol. 3, pp. 332, 333.

The compromise reached is our present system in which uniform laws of admiralty are passed by a majority vote in Congress and the minority must follow.

The uniformity required for laws at sea was also brought into the debates concerning the insertion of "define" before "punish" in the Article I, Section 8, United States Constitution, provision which gives Congress the power "To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations." In support of the addition of the word "define" James Madison said:

"... felony at common law is vague. It is also defective. One defect is supplied by Stat: of Anne as to running away with vessels which at common law was a breach of trust only. Besides no foreign law should be a standard farther than is expressly adopted—If the laws of the States were to prevail on this subject, the citizens of different States would be subject to different punishments for the same offence at sea—There would be neither uniformity nor stability in the law—The proper remedy for all these difficulties was to vest the power proposed by the term "define" in the Natl. legislature." Farrand, Vol. 2, page 316.

It should also be mentioned that the convention at one time even considered a separate Department of Admiralty equal in stature to the Departments of War and Treasury. See Farrand, Vol. 2, p. 136.

The uniform maritime laws would need uniform application and thus the convention delegates gave exclusive jurisdiction to the federal courts:

"... The most bigoted idolizers of State authority have not thus far shown a disposition to deny the national judiciary the cognizances of maritime causes. These so generally depend on the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace. The most important part of them are, by the present Confederation, submitted to federal jurisdiction." The Federalist #80 (Hamilton), from McLean's Edition, New York, 1788, p. 519.

When writing about the class of case exclusively within the federal jurisdiction (admiralty being a member of the class), Hamilton made the following remark:

"... If there are such things as political axioms, the propriety of the judicial power of a government being coextensive with its legislative, may be ranked among the number. The mere necessity of uniformity in the interpretation of the national laws, decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government from which nothing but contradiction and confusion can proceed." The Federalist #80 (Hamilton), from McLean's Edition, New York, 1788, p. 519.

The same concern for uniformity of admiralty matters is shown by the convention records concerning the equal treatment for ports provision of Article I, Section 9, clause 6, United States Constitution. See Farrand, Vol. 2, pp. 410, 417, 418, 421.

B. Judicial Evolution.

It can be clearly seen that the history of the creation of our Federal Constitution justifies the view that Congress alone is vested with the power to legislate in the field of admiralty. The various commentators on admiralty and constitutional law have recognized this to be the case.

In Benedict's great treatise on admiralty, the following description of the federal power to legislate in the field of admiralty is found:

"... In no manner could a uniform administration of that great branch of the law of nations, known as the general maritime law, be secured except by the transfer of all cases of admiralty and maritime jurisdiction to the cognizance of the national judiciary and by committing to Congress the authority to make all laws necessary and proper to carry into execution the power so vested, as by altering and amending the maritime law under which such cases are adjudged and adjusting the jurisdictional limits.

"In the exercise of their admiralty jurisdiction, the Federal courts are not bound by State statutes. State legislation, though recognized in remedial aspects consistent with the general principles and uniform operation of the maritime law, is not permitted to displace the characteristic features of the maritime law or to impair that uniformity which in international and interstate relations the Constitution designed to establish in conferring the maritime power upon the United States." (Citations omitted.) Benedict, *The Law of American Admiralty* (6th Edition 1940), Vol. 1, pp. 14, 15.

In the text of **Modern Constitutional Law**, the following is found:

"The United States Constitution, in Article III, §2, provides that the federal judicial power shall extend 'to all Cases of Admiralty and maritime Jurisdiction.' The United States Supreme Court has ruled that this clause can be read together

with the 'necessary and proper' clause of Article I, §8, of the Constitution, so as to give Congress paramount power to legislate on maritime and admiralty matters. . . ." Antieau, *Modern Constitutional Law*, Vol. 2 (1969), p. 28.

Gilmore and Black, *The Law of Admiralty* (1957) at page 18, recognizes that the jurisdictional grant is also a grant of power over substantive maritime law.

In a law review article concerning liability for oil spills, the congressional preeminence in the field was likewise recognized:

"... The states have no control over maritime commerce, even when it affects state coastlines. This is the exclusive domain of the federal government. As early as the classic opinion of Chief Justice John Marshall in 1824 in *Gibbons v. Ogden*, it was held that the power to regulate even coastwise shipping was in the federal government. The right to make admiralty rules is now a settled exclusive federal right. Accordingly, the state legislatures, by statute, and the state courts, by common law decision, cannot solve the problem of liability for oil spillage from tankers, even by applying the well-settled principles of the common law to this new situation..

"Action by Congress is therefore needed. . . ." (Citations omitted.) Alfred Avins, "Absolute Liability for Oil Spillage," 36 *Brooklyn Law Review* 359 at 367 (1970).

As with the commentators, the writers of the encyclopedias of law recognize the exclusive federal legislative control over admiralty laws:

"... Congress derives its control over maritime matters from those provisions of the federal constitution conferring general power to legislate and from the provisions dealing specifically with admiralty and maritime jurisdiction, and not from the commerce clause. . . ." 2 C.J.S. Admiralty §2(b), p. 64.

"In view of the constitutional provision granting admiralty and maritime jurisdiction to the federal courts, and the provision authorizing the making of all laws necessary and proper for carrying into execution the powers vested in the government of the United States, Congress has full and paramount legislative power in admiralty and maritime matters. . . ." 2 Am.Jur.2d Admiralty §7, p. 723.

The above stated views exist because of the vast amount of support they find in the decisions of this Court. As with many of the judicial concepts which have evolved in this nation, American admiralty law was first adopted from the admiralty law of not only England but the entire maritime commercial world. *New England Marine Ins. Co. v. Dunham*, 11 Wall. 1 (1871). From this basis our admiralty law has developed with the guidance of the Constitution, the laws of Congress and the decisions of the Supreme Court. *Belfast v. Boon*, 7 Wall. 624 (1869).

Of particular concern in the case at bar is the development of admiralty as a legislative grant. In the infancy of our nation, the First Congress passed laws dealing with

such admiralty matters as Tonnage Duty, I Stat. 27 (1789); Ship Registry, I Stat. 55 (1789); and Government and Regulation of Seamen, I Stat. 131 (1790). At first there was some confusion as to the basis of the new nation's admiralty laws. Some jurists held the conviction that the coverage of American admiralty law was limited to the scope of its English counterpart. An example of this view can be found in a lengthy concurring opinion by Mr. Justice Johnson in *Ramsey v. Allegre*, 12 Wheat. 611 (1827). Johnson felt that the admiralty law adopted from England at the time of the Constitution was predominant when confronted with a conflicting congressional law. This interpretation, which tended to make American admiralty subservient to the whims of the English, was banished as totally unreasonable.

"But, besides what we have already said, there is, in our opinion, an unanswerable constitutional objection to the limitation of 'all cases of admiralty and maritime jurisdiction,' as it is expressed in the Constitution, to the cases of admiralty and maritime jurisdiction in England when our Constitution was adopted. To do so would make the latter a part and parcel of the Constitution—as much so as if those cases were written upon its face. It would take away from the courts of the United States the interpretation of what were cases of admiralty and maritime jurisdiction. It would be a denial to Congress of all legislation upon the subject. It would make, for all time to come, without an amendment of the Constitution, that unalterable by any legislation of ours, which can at any time be changed by the Parliament of England—a limitation which never could have

been meant, and cannot be inferred from the words, which extend the jurisdiction of the courts of the United States 'to all cases of admiralty and maritime jurisdiction.' . . ." *Waring, et al. v. Clarke*, 5 How. 441 at 457 (1847).

More modern courts have accepted this rendition of Congress' power to legislate contrary to the traditional foreign admiralty law.

"But it cannot be supposed that the framers of the Constitution contemplated that the maritime law should forever remain unaltered by legislation, *The Lottawanna* (*Rodd v. Heartt*) supra (21 Wall. (US) 577, 22 L.Ed 662), or that Congress could never change the status under the maritime law of seamen, who are peculiarly the wards of admiralty, or was powerless to enlarge or modify any remedy afforded to them within the scope of the admiralty jurisdiction. There is nothing in that grant of jurisdiction—which sanctioned our adoption of the system of maritime law—to preclude Congress from modifying or supplementing the rules of that law as experience or changing conditions may require. . . ." *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36 at 40 (1943).

In his dissent in *Jackson v. The Steamboat Magnolia*, 20 How. 296, 15 L.Ed. 909 at 913 (1858), Justice McLean said, ". . . The admiralty and maritime jurisdiction is essentially a commercial power, and it is necessarily limited to the exercise of that power by Congress."

This view of the power of Congress to legislate in the admiralty area was clearly laid to rest by Mr. Justice Joseph P. Bradley when he recognized the distinction between Commerce Clause power and admiralty in 1875:

"Commerce on land between the different States is so strikingly dissimilar, in many respects, from commerce on water, that it is often difficult to regard them in the same aspect in reference to the respective constitutional powers and duties of the State and Federal Governments. . . ." *Baltimore and Ohio Railroad Co. v. Maryland*, 21 Wall. 456 at 470 (1875).

The *coup de grace* for the concept that Congress has power to legislate in admiralty only through the Commerce power came several years later:

"It is unnecessary to invoke the power given to Congress to regulate commerce with foreign nations, and among the several States, in order to find authority to pass the law in question. The Act of Congress which limits the liability of ship owners was passed in amendment of the maritime law of the country, and the power to make such amendments is co-extensive with that law. It is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce; but, in maritime matters, it extends to all matters and places to which the maritime law extends. . . ." *In Re Garnett*, 141 U.S. 1 at 12 (1891).

C. The law relied on by the lower court.

Nothing is absolute and as with every power the limits of the congressional power to legislate in admiralty inevitably needed clarification and delineation. In its Brief of Amicus Curiae, the State of California, at page 4, points out that the court below failed to give a citation of support when it said, "... Maritime law governs virtually every facet of the shipping industry from the design and construction of vessels to the regulation of their day to day operations and the transactions in which they engage. . . ." (A. 40, 41) Support for the statement is found in the vast body of admiralty statutes and regulations as well as in the language of the Supreme Court. "The ship 'from the moment her keel touches the water' becomes 'a subject of admiralty jurisdiction;' . . ." **Detroit Trust Co. v. Steamer "Thomas Barlum"**, 293 U.S. 21 at 48 (1934). A ship bounding on the high seas is clearly and totally immersed in admiralty jurisdiction. Conversely, a ship moored at a dock, a mere stone's throw from a state's jurisdiction, with longshoremen and stevedores going on and off while they unload or load her, is not so clearly within the purview of maritime law. Thus, a line of demarcation must be laid and there must be a means to separate that which is admiralty from that which is not. This is the task the Supreme Court sought to accomplish in its decision in **Southern Pacific Co. v. Jensen**, 244 U.S. 205 (1917).

The fact situation in **Jensen** involved a longshoreman injured while he was unloading a ship engaged in interstate maritime commerce. The injured worker tried to seek workmen's compensation under New York law. In declaring that the injury was within maritime jurisdiction and thus state law could not apply, the Court stated:

"... Considering our former opinions, it must now be accepted as settled doctrine that, in consequence of these provisions, Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country. . . . And further, that, in the absence of some controlling statute, the general maritime law, as accepted by the Federal courts, constitutes part of our national law, applicable to matters within the admiralty and maritime jurisdiction. . . ." (Citations omitted.) 244 U.S. at 215.

The Court found that the work of a stevedore is maritime in nature and within admiralty jurisdiction; therefore, New York could not apply its statute to a stevedore's injury:

"If New York can subject foreign ships coming into her ports to such obligations as those imposed by her Compensation Statute, other states may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the states and with foreign countries would be seriously hampered and impeded. . . ." 244 U.S. at 217.

Thus, a majority of the Court felt the line should be drawn with Jensen's injury on the admiralty side.

For the purpose of resolving the case at hand, it is not necessary to trace the battle between state workmen's compensation laws and admiralty jurisdiction. It is

useful, however, to take notice of the judicial language which came forth as this Court struggled to find an adequate test to resolve the issues presented when two jurisdictions are so close and so intertwined.

In the years after **Jensen**, Congress tried to delegate to the states its power to control compensation to injured maritime workmen. This brought the following reaction from the Court:

"As the plain result of these recent opinions and the earlier cases upon which they are based, we accept the following doctrine: The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law, and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the states all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law, or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the Federal government was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere." **Knickerbocker Ice Co. v. Stewart**, 253 U.S. 149 at 160 (1920).

Also in **Knickerbocker Ice**, the Court found that Congress could not delegate the power over admiralty entrusted to it by the Constitution.

"Considering the fundamental purpose in view and the definite end for which such rules were accepted, we must conclude that in their characteristic features and essential international and interstate relations, the latter may not be repealed, amended, or changed except by legislation which embodies both the will and deliberate judgment of Congress. The subject was intrusted to it, to be dealt with according to its discretion,—not for delegation to others. To say that because Congress could have enacted a compensation act applicable to maritime injuries, it could authorize the states to do so, as they might desire, is false reasoning. Moreover, such an authorization would inevitably destroy the harmony and uniformity which the Constitution not only contemplated, but actually established,—it would defeat the very purpose of the grant." (Citation omitted.) 253 U.S. at 164.

In **Knickerbocker Ice**, the Court was confronted with a congressional act allowing states to apply their respective workmen's compensation statutes to injured maritime workmen and, likewise, in **Washington v. Dawson and Co.**, 264 U.S. 219 (1923), at issue was the validity of a congressional attempt to include state workmen's compensation remedies under the "Saving to Suitors" clause. The Court stated:

"Without doubt Congress has power to alter, amend, or revise the maritime law by statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general employers' liability law, or

general provisions for compensating injured employees; but it may not be delegated to the several states. The grant of admiralty and maritime jurisdiction looks to uniformity; otherwise wide discretion is left Congress. . . ."

Upon reliance of these decisions, Congress took the suggestion of the **Dawson** Court and in 1927 enacted the Longshoremen's and Harbor Worker's Compensation Act, 44 Stat. 1426-27, 1429, 1431-32, 1434-46 (1929) as amended 33 U.S.C. §§901-50 (1958).

There were lengthy dissents in all these workmen's compensation cases. The main thrust was that the dissenters simply did not believe that the application of workmen's compensation laws to land based workers was a major encroachment upon the admiralty domain. Mr. Justice Brandeis, in his dissent in **Dawson**, provides an example:

"... How can a law of New York, making a New York employer liable to a New York employee for every occupational injury occurring within the state, mar the proper harmony and uniformity of the assumed general maritime law in its interstate and international relations, when neither a ship nor a shipowner is the employer affected, even though the accident occurs on board a vessel on navigable waters? The relation of the independent contractor to his employee is a matter wholly of state concern. The employer's obligation to pay and the employee's right to receive compensation are not dependent upon any act or omission of the ship or of its owners. To

impose upon such employer the obligation to make compensation in case of an occupational injury in no way affects the operation of the ship. . . ."

Likewise, the dissenters from the *Jensen* decision, felt that it was inequitable to leave injured workers remediless simply because they were injured in or on a ship which, but for the admiralty jurisdiction, would have been clearly within the states territory. Holmes in his dissent in *Jensen* shows his concern in reference to the place of the injury and the denial of a remedy by the admiralty jurisdiction.

" . . . The short question is whether the power of the state to regulate the liability in that place and to enforce it in the state's own courts is taken away by the conferring of exclusive jurisdiction of all civil causes of admiralty and maritime jurisdiction upon the courts of the United States." *Southern Pacific Co. v. Jensen*, 244 U.S. at 218, 219.

Further, in the same dissent, Holmes espouses his belief that if Congress is silent, the laws of a state should not leave an injured worker remediless:

"It might be asked why, if the grant of jurisdiction to the courts of the United States imports a power in Congress to legislate, the saving of a common-law remedy, i.e., in the state courts, did not import a like if subordinate power in the states. . . . it is too late to say that the mere silence of Congress excludes the statute or common law of a state from supplementing the wholly inadequate maritime law of the time of

the Constitution, in the regulation of personal rights, and I venture to say that it never has been supposed to do so, or had any such effect." (Citations omitted) *Southern Pacific Co. v. Jensen*, 244 U.S. at 223.

Thus, to some, the law set forth in *Jensen* seemed unfair as applied to the fact situation involved, to-wit: workmen's compensation. In two cases since 1917 the Court has likewise shown a reluctance to apply *Jensen* in such a way as to deny injured parties a remedy under the state law where they would have no comparable remedy under federal admiralty law. In *Just v. Chambers*, 312 U.S. 383 (1940), the Court was faced with either following *Jensen* and withholding from the plaintiffs the survivorship of their claim of personal liability against a deceased ship owner or applying the law of the state of Florida (where the accident occurred) and preserving the plaintiff's claim. Using some language which the Appellant feels tended to limit *Jensen*, the Just Court allowed the use of the state law. A similar situation arose in *Standard Dredging Corp. v. Murphy*, 319 U.S. 306 (1943), where the Court allowed the application of a state unemployment insurance tax to maritime employers. Both of these cases, like the dissents in the workmen's compensation cases, are based upon the belief that the state laws involved simply were not a harmful encroachment upon admiralty jurisdiction and laws.

"... The effect on admiralty of an unemployment insurance program is so markedly different from the effect which it was feared might follow from workmen's compensation legislation that we find no reason to expand the *Jensen* doctrine into this new area..."

The Murphy Court stated the rule given in *Just* and applied it to the Murphy fact situation as follows:

"Granting that the federal government might choose to operate its own uniform unemployment insurance system for maritime workers if it chose, 'Uniformity is required only when the essential features of an exclusive federal jurisdiction are involved.' *Just v. Chambers*, 312 US 383, 392, 85 L.Ed. 903, 909, 61 S.Ct. 687. When state compensation laws began to provide a remedy for maritime torts, it was at least arguable that the state remedy interfered with the existing admiralty system of relief through actions such as maintenance and cure. But in dealing with unemployment insurance 'exclusive federal jurisdiction' is not affected at all. Congress retains the power to act in the field, and in the meantime, federal courts have nothing to do with it. No principle of admiralty requires uniformity of State taxation. Taxes on vessels and other business activities of operators have previously been upheld.' We hold that nothing in Article 3, §2 of the Constitution places this tax beyond the authority of the State." *Standard Dredging Corp. v. Murphy*, 319 U.S. at 309, 310.

The *Jensen* decision specifically provided for state action in certain limited instances which might incidentally affect admiralty.

"In view of these constitutional provisions and the Federal act it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modi-

fied, or affected by state legislation. That this may be done to some extent cannot be denied. . . . Equally well established is the rule that state statutes may not contravene an applicable act of Congress or affect the general maritime law beyond certain limits. . . . And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself. These purposes are forcefully indicated in the foregoing quotations from *The Lottawanna*." *Southern Pacific Co. v. Jensen*, 244 U.S. at 216.

Thus, the *Jensen* doctrine as interpreted by years of later decision really was not changed drastically. The original decision provided the same tools for finding the applicable law as some later decision chose to emphasize. It should be noted that virtually all of the cases discussed above involved state statutes which were written to operate and did operate mainly in a non-maritime atmosphere. There are thousands of workmen's compensation claims which do not at all involve injuries to maritime workers. The same is true for the application of wrongful death laws, unemployment insurance tax laws, and laws for the survivorship of causes of action. So the problem in *Jensen* and cases which followed it was the

division of powers between state and federal government when the two forces acting in their respective spheres of jurisdiction found themselves each asserting authority over the same segment of a vague border between them and in matters having only non-essential maritime involvements. Congress has eventually acted in such a manner as to define and resolve the various conflicts as it did in the workmen's compensation situation. When new borderline facts arose, the judicial efforts to find a remedy (which took place before the congressional solution was made) often engendered some confusion, but as this Court has recognized, the law found in *Jensen* is still valid.

In *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 at 130 (1962), this Court quoted with approval the language of Judge Hutcheson of the Fifth Circuit given in *DeBardeleben Coal Corp. v. Henderson*, 142 F.2d 481 (1944):

"... No ground should be yielded to state jurisdiction in cases falling within the principle of the *Jensen* case merely because the Supreme Court, before the Federal Compensation Law went into effect, did here a little, there a little, chip and whittle *Jensen* down in the mass of conflicting and contradictory decisions in which it advanced and applied the "local concern" doctrine to save to employees injured on navigable waters, and otherwise remediless, the remedies state compensation laws afforded them. . . ."

Very recent evidence of the vitality of the *Jensen* theory and the Court's understanding of its history is found in *Victory Carriers v. Law*, ____ U.S. ____, 30 L.Ed. 2d 383, 92 S.Ct. ____ (1971). Mr. Justice White recognized the confusion which arose in the efforts to define the seaward limit of a state's power and he discusses in foot-

note No. 7, 30 L.Ed.2d at 389, the evolution of the **Jensen** line. Also in this opinion, Mr. Justice White points out the reliance that Congress made upon **Jensen** when it passed the Longshoremen's and Harbor Workers' Compensation Act, *supra*. Likewise, in **State Board of Ins. v. Todd Shipyard Corp.**, 370 U.S. 451 at 457 (1962), the Court noted the continued acceptance of **Jensen**.

That the Florida Act deals with an admiralty matter is shown by Florida Statutes 376.021(6), (A 58), stating that the Florida Act supplements the W.Q.L.A. which is in Title 33 (an admiralty section) of the United States Code. Also, Florida's assertion at page 64 of its Brief that the Limitation of Liability Act (which is definitely an admiralty statute) cannot exist together with the Florida Act affirms that Florida acted within the admiralty jurisdiction of the United States. On page 75 the Appellant asserts that Congress did not intend for the W.Q.L.A. to operate in admiralty. 33 U.S.C. 1161(b)(2) proves this wrong by continual referral to other maritime laws.

D. The law applied to the case at Bar.

The court below found as fact that the Florida Act sought to deal with maritime matters and on the basis of the law and history stated above, held that the Florida Act was a far greater intrusion into the federal maritime domain than the workmen's compensation law in **Jensen** (A.44). This holding is substantiated by virtually every facet of the Florida Act.

The State Act is aimed specifically at the shipping industry rather than at local industry. This fact distinguishes it from many of the borderline cases between state and admiralty jurisdiction and puts it squarely in

conflict with the case law above. Florida Statutes 376.07(2)(a) and 376.08(2) directly conflict with the federal maritime law by providing for inspection which, as the Appellant states at page 48 of its Brief, is not new to maritime law. However, this practice in conjunction with a statute aimed specifically at large ocean-going ships, is very new to state law. Likewise, the concept of a state port manager having power to determine unseaworthiness is maritime in nature.

The minimum weather and sea conditions requirements are strictly maritime in nature as are the requirements for equipment and training of the crew. State personnel are commanded to remain independent of but cooperate with (which is a rather vague term) any federal clean-up operations. These federal clean-up operations would be made under the admiralty laws of Congress and thus Florida again intrudes upon maritime law.

The limits of liability established by the Florida Act are greatly different than those established by general maritime law. The defenses provided by the federal maritime law are left to bureaucratic whims in the Florida Act. The state need only plead and prove the fact of the discharge to recover, a procedure which is markedly different from the federal laws. It is to be assumed that the Florida Act is intended to be enforced in Florida's courts and that being the case, Florida has attempted to create admiralty courts in direct contravention of Article III, Section 2 of the United States Constitution.

Article I, Section 8, provides that Congress shall have power "To define and punish piracies and felonies committed on the high seas; and offenses against the law of nations." In the Florida Act (Section 376.12) the master of any vessel (apparently even a vessel not destined to

or leaving from a Florida port) is guilty of a felony if he fails to report a discharge on the high seas but within Florida's waters. Thus, the Florida Act again is in direct conflict with the Constitution.

On page 83 of its brief the Appellant contends that the state act is valid under the "gap theory." As support for this gap theory the State advances **Rodrigue v. Aetna Casualty and Surety Co.**, 395 U.S. 352 (1969) and **Chevron Oil Co. v. Huson**, — U.S. —, 30 L.Ed.2d 296 (1971). Appellant reads these two cases to say that there are gaps in federal and international admiralty law which may be filled by state law. These cases cannot be construed to support this conclusion. Both of these cases were decided under the Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C. §§1131 et seq. (hereinafter referred to as the "Lands Act"). **Rodrigue** involved suits brought in admiralty by the survivors of workers killed in accidents on oil drilling platforms positioned off the coast of Louisiana. The Court found that in the "Lands Act, Congress intended to treat such structures as artificial islands and thus apply normal federal law supplemented by the law of the adjacent state, rather than treat them as vessels and apply admiralty law. 395 U.S. at 355. Since admiralty law and the Death on the High Seas Act, 46 U.S.C. §§761 et seq., (an admiralty statute) did not apply and federal law did not provide for wrongful death actions, the law of the adjacent state was applied to fill the void in the non-admiralty federal law. The same situation arose in **Huson**, where state law was applied to fill a gap in non-admiralty federal law since admiralty did not apply. However, Admiralty law obviously does apply in the case at bar and the "gap theory" is totally misplaced.

CHAPTER 70-224, LAWS OF FLORIDA, IS UNCONSTITUTIONAL AS IT IS IN DIRECT CONFLICT WITH FEDERAL STATUTES IN AN AREA WHICH HAS BEEN PREEMPTED BY FEDERAL STATUTES.

A. The entire body of Federal admiralty law preempts the field.

Recently this Court affirmed an Eighth Circuit Court of Appeals opinion which clearly sets forth the law concerning statutory preemption. In *Northern States Power Company v. State of Minnesota*, 447 F.2d 1143 (8 CA, 1971), aff'd ___ U.S. ___, 31 L.Ed.2d 569, 92 S.Ct. ___ (1972), the issue resolved was whether the federal government, through the Atomic Energy Commission (AEC), had exclusive authority to regulate the radioactive waste releases from nuclear power plants so as to preclude state regulation of same releases. The power company was issued a provisional permit by the AEC for the construction of a nuclear power plant near Monticello, Minnesota. The power plant met all federal requirements but the state of Minnesota imposed a more stringent set of requirements which covered the same areas as the federal regulations. To defend its authority to make such regulation, Minnesota made three major contentions: (1) regulation of such radioactive waste is within the Article X police power of the states; (2) the federal legislation creating the AEC does not expressly or impliedly preempt the power of a state to make such regulations; and (3) even if there is a preemption of the field by Congress, a state can still make concomitant regulation.

As a basis for denying all three of these contentions, the court in **Northern States Power** gave the following statement of law:

"The doctrine of federal pre-emption has its roots in Article VI, Clause 2 of the United States Constitution, the 'Supremacy Clause,' which elevates federal law above that of the States. It provides:

'This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'

On the other hand, under the Tenth Amendment to the Constitution '(t)he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, are reserved to the States respectively, or to the people.'

(1) Thus, in the approach to any inquiry into federal preemption, it must be initially determined that Congressional action establishing federal regulation in a particular field has been undertaken pursuant to one of the powers delegated to the United States by the Constitution. . . .

Once it is ascertained that the federal government possesses the power to regulate in a given area, the question is whether Congress has exercised its power of legislation in such a manner as to exclude the states from asserting concurrent jurisdiction over the same subject matter.

(2) First, as the Supreme Court noted in *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132;

(a) holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility * * * ...

(3) Second, absent inevitable collision between the two schemes of regulation it must be determined whether Congress manifested an intent to displace coincident state regulation in a given area. Where Congress has unequivocally and expressly declared that the authority conferred by it shall be exclusive, then there is no doubt but that states cannot exert concomitant or supplementary regulatory authority over the identical activity....

(4, 5) Third, even where Congress has not expressly prohibited dual regulation nor unequivocally declared its exclusionary exercise of authority over a particular subject matter, federal pre-emption may be implied.... Key factors in the determination of whether Congress has, by

implication, pre-empted a particular area so as to preclude state attempts at dual regulation include, *inter alia*: (1) the aim and intent of Congress as revealed by the statute itself and its legislative history, *Florida Lime & Avocado Growers, Inc. v. W. P. M. Caney*, 343 U.S. 659 (1952); (2) the pervasiveness of the federal regulatory scheme as authorized and directed by the legislation and as carried into effect by the federal administrative agency (3) the nature of the subject matter regulated and whether it is one which demands 'exclusive federal regulation in order to achieve uniformity vital to national interest. "...and ultimately (4) 'whether, under the circumstances of (a) particular case (state law stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress.' . . ." (citations omitted) *Northern States Power Co. v. Minnesota*, 447 F.2d 113 at 1145-1147.

Using this clear statement of the federal law of statutory preemption in the present case, the first issue is whether Congress acted within its constitutional limits in enacting the Water Quality Improvement Act of 1970, Pub. L. 91-224, 33 U.S.C. §1161, et seq.; the Limitation of Liability Act, Chapter 43, Sec. 3, 9 Stat. 635 (March 3, 1851), amended and codified 46 U.S.C. §183 (1964); The Extension of Admiralty Act, 62 Stat. 496 (June 19, 1948), 46 U.S.C. 740; and the Federal Wreck Statute, 33 U.S.C. §§409, 414, 419. Since the coverage of these acts extends over admiralty as well as interstate and foreign commerce, there can be no doubt that Congress had constitutional justification for its acts. At no point does the Appellant contest the basis for these acts.

Next, it must be decided whether compliance with both federal and state regulations is a physical impossibility. The rule in this area of preemption as stated in *Northern States Power* comes from *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, at 142-143 (1963).

In *Northern States Power*, the court found there was no impossibility of dual compliance because the Minnesota regulations were more stringent than the federal regulation so compliance with the state regulations insured compliance with both. In the case at bar, the federal government, pursuant to the various federal statutes, has put into effect a vast body of rules and regulations to accomplish the statutory purpose.

Florida, on the other hand, has not yet promulgated a comprehensive body of regulations for the enforcement of its act. (See State of Florida, Department of Natural Resources, Division of Marine Resources, Regulations, Chapter 16B — 16.08, A 73-75.) It is difficult to conceive that Florida could draft an independent set of regulations that would not conflict with the Federal regulations to the point of creating a physical impossibility of dual compliance. The Court has taken cognizance of like situations in the past. See *Bethlehem Steel Co. v. New York Labor Rel. Board*, 330 U.S. 767 at 774 (1947). The meaning of the words "physical impossibility" is crucial in testing the Florida Act under this rule. Assuming that the phrase simply means that a diligent, good faith effort to comply with both laws is certain to fail, then the Florida Act must fall by this test. As can be seen by the finding of fact upon which District Court Judge Charles R. Scott based his temporary restraining order in the proceedings below, shippers who were in compliance with the Federal Act found it impossible to comply with the State Act.

"4. That substantial injury, loss, or damage has already been suffered by some of said ship-owners or operators and others whose businesses are related thereto or dependent thereon and that irreparable injury, loss, or damage will be suffered by said persons or entities unless a temporary restraining order is issued against said defendants, in that vessels or barges carrying oil, gasoline, or other hazardous substances are prohibited from using any Florida port on or after March 15, 1971, unless their owners or operators comply with the evidence of financial responsibility requirements of the State law and rule promulgated thereunder, which requirements cannot be met without subjecting said owners or operators to the grave risk of unlimited strict liability; that said owners or operators being unable to obtain insurance against unlimited strict liability to achieve compliance are subject to civil penalties up to \$50,000 per day for not being in compliance or for violation of any other section of said statute or any rule or regulation of the defendants; that said owners or operators being unable to obtain insurance against unlimited strict liability will be seriously restricted in the ability to obtain or maintain financing and to otherwise operate and maintain their businesses on a viable and stable basis; that those whose businesses are related to or dependent on shipping will be materially affected by loss of revenue, inability to obtain fuel and supplies, and the inability to market finished products a result of the inability of ships and other carriers to enter the Port of Jacksonville and other ports of

Florida; and it appearing to the Court that neither Chapter 376 nor the general law of Florida permits any right of recovery against the State for any such damages; all as appearing from the complaint, statutes, exhibits, and the following evidence submitted to this Court, to wit:

‘(a) The testimony of the witnesses, H. G. Williams, Edwin Belcher, III, and John Connolly, Jr., that shipowners and operators have been unable to obtain insurance against unlimited strict liability with direct action against the insurer in order to comply with the Florida requirements;’ ”

* * *

Temporary Restraining Order signed March 19, *nunc pro tunc* March 12, 1971, AWO, et al. v. Askew, et al.

Thus, by the rule concerning impossibility of dual compliance, the Florida Act must fall and no inquiry into congressional intent is required.

A second major rule of preemption found in *Northern States Power* requires a determination as to whether Congress manifested an intent to displace coincident state regulations in a given area. While 33 U.S.C. §1161(o) could be construed to reflect a congressional intent that the W.Q.I.A. would not itself preclude non-conflicting state regulations, this section specifically maintains the vitality of the other admiralty provisions enacted by Congress pursuant to Article III, Section 2 and the Supremacy Clause.

(o) (1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency under any provision of law for damages to any publicly-owned or privately-owned property resulting from a discharge of any oil or from the removal of any such oil.

Thus, the preemptive effect of the various admiralty laws which could have overruled the State Act before the W.Q.I.A. can still do so afterwards. Likewise, to be constitutional, the State Act must not be incompatible with the entire body of judicial opinion that govern the admiralty field.

"... this Court has fashioned a large part of the existing rules that govern admiralty. And States can no more override such judicial rules validly fashioned than they can override Acts of Congress. (Citations omitted). *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 at 314 (1955).

The Appellant in Point I(F) of its Brief recognizes the preemptive effect of the Limitation of Liability Act, 9 Stat. 635, 46 U.S.C. §§181-189. Stated with candor: "The Limited Liability Act cannot co-exist in the same courtroom with the Florida act." This only leaves the issue of the constitutionality of the Limited Liability Act. This Act was passed in 1851 and since that time it has been used repeatedly and has been a cornerstone of the admiralty law of this nation as well as many other seafaring

nations. Vast amounts of legislation have been passed depending upon its existence. The Supreme Court has promulgated Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims to insure the orderly application of the Limited Liability Act. The immense importance of the Act can be gleaned by reading Chapter 10 of Gilmore and Black, *The Law of Admiralty* (1957), the entire chapter being devoted to this one Act. The same is true of Chapter 10 of Baer, *Admiralty Law and The Supreme Court* (1969).

Aside from the test of time and usage, the Limitation of Liability Act is constitutional because this Court has said that it is:

"In these provisions of the statute we have sketched, in outline, a scheme of laws and regulations for the benefit of the shipping interest, the value and importance of which to our maritime commerce can hardly be estimated. Nevertheless, the practical value of the law will largely depend on the manner in which it is administered. If the courts having the execution of its administer it in a spirit of fairness, with the view of giving to ship-owners the full benefit of the immunities intended to be secured by it, the encouragement it will afford to commercial operations as before stated, will be of the last importance; but if is administered with a tight and grudging hand, construing every clause most unfavorably against the ship-owner, and allowing as little as possible to operate in his favor, the law will hardly be worth the trouble of its enactment. Its value and efficiency will also be greatly diminished, if not

entirely destroyed, by allowing its administration to be hampered and interfered with by various and conflicting jurisdictions."

* * *

"We have no doubt that Congress had power to pass the law. It is not only a maritime regulation in its character, but it is clearly within the scope of the power given to Congress 'to regulate commerce.' In the case of *The Lottawanna*, 21 Wall., 558 [88 U.S., XXII., 654] speaking of the power to make changes in the maritime law of the country, we said: 'Congress undoubtedly has authority under the commercial power, it no other, to introduce such changes as are likely to be needed. The scope of the maritime law and that of commercial regulation are not coterminous, it is true: but the latter embraces much the largest portion of ground covered by the former. Under it Congress has regulated the registry, enrollment, license and nationality of ships and vessels; the method of recording bills of sale and mortgages thereon; the rights and duties of seamen; the limitations of the responsibility of ship-owners for the negligence and misconduct of their captains and crews; and many other things of a character truly maritime....'"

"It need not be added that if Congress had power to pass the Act of 1851 [9 Stat. at L., 635], it is binding on all courts and jurisdictions throughout the United States."

"We have said that, by the provisions of the Act, the scheme was sketched in outline. A reference to

its provisions shows that it was only in outline; and that the regulation of details as to the form and modes of proceeding was left to be prescribed by judicial authority. The law was evidently drawn in view of similar laws adopted in operation in England and in some of the States. It laid down a few general principles and propositions and left it to the courts to enforce them and carry them into practical effect."

Providence and New York Steamship Co. v. Hill Mfg. Co., 109 U.S. 578, 27 L. Ed. 1038 at 1042, 1043 (1883). The Act being a mere outline, it was left to the Supreme Court to apply its provision in a fair and reasonable manner. Starting from *Norwich and New York Transportation Co. v. Wright*, 13 Wall. 104 (1871) up until the present, the Supreme Court has fashioned rules and judicial opinions to meet this task. See Gilmore and Black, *Law of Admiralty* (1957), pp. 663-667. Thus, the Act being constitutionally sound in its origin, it is inconceivable that under the hegemony of the nation's high court the Act could be unconstitutional for lack of procedural due process as the state alleges. Today's limitation proceeding is based on "the 1851 Act and this Court's rules . . ." *British Transport Company v. United States*, 354 U.S. 129 at 134, 135 (1957). The Limitation of Liability Act was noted without question as being vital and still in force in *Wyandotte Trans. Co. v. United States*, 389 U.S. 191 at 205, 206 (1967).

The Appellant argues that the Limited Liability Act has been changed by the W.Q.I.A. This is not a certainty because the same type argument was put forth in *Wyandotte* in reference to the Rivers and Harbors Act of 1899

and the Limited Liability Act and it was held that the Limited Liability Act was unchanged. Furthermore even if the W.Q.I.A. does change the Limited Liability Act, it does so only in relation to governmental cleanup cost. Any change is negated when viewed further in the light of 33 U.S.C. §1161(o) (1) and the fact that the W.Q.I.A. is geared to gain recoveries from insurance and the assets tendered as proof of financial responsibility rather than the ship or its remains.

It should also be observed that to declare the Limitation of Liability Act unconstitutional would be to make American admiralty law very much incompatible with the international law of the seas. See footnote No. 5 on pages 231 and 232 and Appendix D of Baer, *Admiralty Law and the Supreme Court* (1969).

In Section I(D) of its Brief, the Appellant seeks to have the Admiralty Extension Act of 1948, 62 Stat. 496 (June 19, 1948), 46 U.S.C. §740 (A. 93) declared unconstitutional. On page 51 of the Appellant's Brief, the attack begins with a quote from Mr. Justice Story which later was changed by the judicial extension of admiralty to the non-tidal navigable waters found in *The Genesee Chief v. Fitzhugh*, 12 How. 443 (1851). Next, a quote from Justice Johnson's concurring opinion in *Ramsay v. Allegre*, 12 Wheat. 611 (1827), in which opinion Johnson is the champion of the cause to have American admiralty law be a frozen mirror image of the English admiralty law by "... fixing the period of the revolution for the law of the jurisdiction of the admiralty." 12 Wheat. at 638. This view of Johnson's was destroyed in *Waring v. Clarke*, 5 How. 441 at 457 (1847).

"But, besides what we have already said, there is, in our opinion, an unanswerable constitutional objection to the limitation of 'all cases of admiralty and maritime jurisdiction,' as it is expressed in the Constitution, to the cases of admiralty and maritime jurisdiction in England when our Constitution was adopted. To do so would make the latter a part and parcel of the Constitution—as much so as if those cases were written upon its face. It would take away from the courts of the United States the interpretation of what were cases of admiralty and maritime jurisdiction. It would be a denial to Congress of all legislation upon the subject. It would make, for all time to come, without an amendment of the Constitution, that unalterable by any legislation of ours, which can at any time be changed by the Parliament of England—a limitation which never could have been meant, and cannot be inferred from the words, which extend the jurisdiction of the courts of the United States 'to all cases of admiralty and maritime jurisdiction.' . . ."

The Court in *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. at 40 (1943) recognized the power of Congress to change admiralty rules as experience or changing conditions required. Since there is no constitutional bar and since the "Savings to Suitors Clause" in 28 U.S.C. 1333 is merely a congressional act, the door is open for necessary changes to be made. This is exactly what Congress did in passing the Admiralty Extension Act. See *Victory Carriers v. Law*, 30 L.Ed.2d 383 at 389, 390, footnote No. 8.

The Admiralty Extension Act was upheld in lower courts (see *United States v. Matson Navigation Co.*, 201 F.2d 610, 614-616 (CA 9 1953); *American Bridge Co. v. The Gloria O*, 98 F.Supp. 71, 73-74 (ED NY 1951); *Fematt v. City of Los Angeles*, 196 F.Supp. 89, 93 (SD Cal 1961)), and accepted as constitutional in *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206 at 372, 373 (1963):

"Respondent contends that it is not liable, at least in admiralty, because the impact of its alleged lack of care or unseaworthiness was felt on the pier rather than aboard ship. Whatever validity this proposition may have had until 1948, the passage of the Extension of Admiralty Jurisdiction Act, 62 Stat 496, 46 USC §740, swept it away when it made vessels on navigable water liable for damage or injury 'notwithstanding that such damage or injury be done or consummated on land.' . . . We think it sufficient for the needs of this occasion to hold that the case is within the maritime jurisdiction under 46 USC §740 when, as here, it is alleged that the shipowner commits a tort while or before the ship is being unloaded, and the impact of which is felt ashore at a time and place not remote from the wrongful act."

Likewise, the Act was accepted and discussed in *Wacirema Operating Co. v. Johnson*, 396 U.S. 212 at 221-223 (1969). Also *Rodrigue v. Aetna Casualty and Surety Co.*, 395 U.S. 352 at 360 (1969), "... But when the damage is caused by a vessel admittedly in admiralty jurisdiction, the Admiralty Extension Act would now make available the admiralty remedy in any event." The Act is also upheld

by the majority in **Victory Carriers**, *supra*, 30 L.Ed.2d at 390, 391, and by Mr. Justice Douglas (Brennan concurring) in dissent, 30 L.Ed.2d 397, 398. Thus the Admiralty Extension Act is constitutional and in present use. Acts limiting liability of ship owners were an accepted part of the maritime law adopted by this country at the time of the constitutional convention, thus it would be hard to conceive that this concept is repugnant to the constitutional criteria for due process.

The Florida Act is **not** limited to recovery for sea to shore torts. A recovery is purportedly authorized thereunder for the clean-up cost of an oil slick which never even touched shore. Thus, the Limited Liability Act would easily find itself being confronted by a conflicting state statute in its traditional domain. 46 U.S.C. §740 (1948). Admiralty jurisdiction covers suits for damages on land caused by an oil spill started at sea. See **Petition of New Jersey Barging Corp.**, 168 F.Supp. 925 (1958). If the spill only causes damage to the water and does not come ashore, then admiralty jurisdiction still prevails, but not by virtue of 46 U.S.C. §740. **California v. S. S. Bournemouth**, 307 F.Supp. 922 (DC, 1969) and 318 F.Supp. 839, 10 A.L.R.Fed. 950 (1970). Likewise, the Florida Act conflicts with and is preempted by the Federal Wreck Statute, 33 U.S.C., Sections 409, 414, 419, which provides that the owner of a vessel which has been sunk in navigable waters may relieve himself of responsibility by abandoning the wreck to the Government unless the vessel was sunk as a result of negligence, in which event the owner may be held liable for removal costs. **Wyandotte Transportation Co. v. United States**, 389 U.S. 191 (1967). Section 376.15 of the Florida Act, together with Section 376.16, is in direct conflict with the Federal Wreck Statute. Section 376.15 provides:

"(1) It is unlawful for any person, firm, or corporation to store or leave any vessel in a wrecked, junked, or substantially dismantled condition or abandoned upon any public waters or at any port in this state without the consent of the agency having jurisdiction thereof or docked at any private property without the consent of the owner of the private property."

Section 376.16 of the Florida Act is the enforcement provision for any violation of Chapter 376 and provides:

"(1) It is unlawful for any person to violate any provision of this chapter or any rule, regulation, or order of the department made hereunder. Violations shall be punishable by a civil penalty of up to fifty thousand dollars to be assessed by the department. Each day during any portion of which the violation occurs constitutes a separate offense."

Sections 376.15 and 376.16, when read together, clearly contravene the Federal Wreck Statute.

Two further tests of preemption are set forth in *Northern States Power*, supra. One deals with the pervasiveness of the federal regulatory scheme. The other hinges on whether the subject matter is one which demands "exclusive federal regulation in order to achieve uniformity vital to national interest." *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. at 143-144.

Florida Lime and Avocado Growers also provides the following rule:

"The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence in the field, not whether they are aimed at similar or different objectives." 373 U.S. at 142.

The Court next states that preemption may be found **either** when the nature of the subject matter permits no other conclusion **or** when Congress unmistakably so ordains. (The disjunctive nature of this sentence is emphasized.) The subject matter of the Florida Statute is the application of unlimited strict liability for oil spills. This is definitely a subject matter which lies within the domain of admiralty law. **Petition of New Jersey Barging Corp.**, 168 F.Supp. 925 (1958). There can be no doubt that admiralty law and the regulation of ships, their equipment, operation, and the liabilities which they are subject to, are so totally inter-mixed with interstate and international maritime commerce that uniformity is a necessity. This was accepted by those drafting the Constitution. Likewise, this Court has recognized the need for uniformity through the years:

"One thing, however, is unquestionable: the Constitution must have referred to a system of law co-extensive with and operating uniformly in the whole country. It certainly could not have been the intention to place the Rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a com-

mercial character affecting the intercourse of the States with each other or with foreign States." *The Lottwanna*, 21 Wall. 558, 22 L.ed. 654 at 662 (1875).

It is equally well accepted that state laws give way when they contravene the required uniformity.

"... It is true that state law must yield to the needs of a uniform federal maritime law when this Court finds roads on a harmonious system. . . ." (Citations omitted.) *Romero v. International Terminal Operating Co.*, 358 U.S. 354 at 373 (1959).

The finding of fact in the Court below in the case sub judice recognizes that the Florida Act not only makes inroads into the uniformity of admiralty law, but also seeks to change it.

"That the Florida Act constitutes unlawful intrusion into the exclusive federal admiralty domain is apparent when one observes the extent to which that act would change substantive maritime law. . . ." (A. 2)

It is to be noted that if the nature of the subject matter requires uniformity, congressional intent need not be examined.

The Appellants seek to make much of the words of §1161(o)(2) of the Federal Act, "Nothing in this section shall be construed as preempting any state or political

subdivision thereof from imposing any requirement or liability with respect to the discharge of oil into any waters within such state." It should be emphasized that this is not an affirmative grant of power to the states to legislate in the area of concern. Rather, this section simply provides that nothing in this section of the W.Q.I.A. will prevent non-conflicting state action in the area. The Admiralty Extension Act, the Limitation of Liability, the Federal Wreck Statute, and the whole body of admiralty law otherwise are not sought to be submerged to state authority under the literal application of this section, and continue to be barriers to state legislation relating to oil spills. §§1161(o)(1), (2) and (3) show the congressional intention that states may legislate only if their laws do not conflict with the W.Q.I.A., the admiralty laws of this nation, and, of course, as the lower court pointed out, with the Constitution as interpreted by our nation's judiciary. Also, §1161(o)(3) shows a congressional intention that a mere conflict between a state statute and the W.Q.I.A. rather than an impossibility of dual compliance is all that is necessary to revive the preemption waived in §1161(o)(2).

While conceivably the Florida statute may be similar to the Minnesota regulations found in **Northern States Power** in that it is a more stringent requirement than the federal statute but creates no physical impossibility of dual compliance, this similarity is lost because, unlike the Minnesota regulations, the Florida statute vests power in an administrative agency to promulgate rules and regulations which might contradict the federal statute or the rules and regulations created by the Coast Guard and the President as provided in §1161 of the W.Q.I.A.

It is obvious that a comprehensive federal administrative procedure for enforcing the W.Q.I.A. cannot help but be in conflict with almost any state police action or administrative procedure. This is especially true since the United States has such a comprehensive procedure in the Coast Guard regulations and the executive orders:

"... But when federal administration has made comprehensive regulations effectively governing the subject matter of the statute, the Court has said that a state regulation in the field of the statute is invalid even though that particular phase of the subject has not been taken up by the federal agency." **Bethlehem Steel Co. v. New York Labor Relations Board**, 330 U.S. 767 at 774 (1947).

B. Police power is not applicable.

The State, in its Brief, relies heavily on the argument that it is acting within its police power by passing the State Act. The police power has no singular source from which it springs, and there have been many divergent attempts to define it. See 16 Am.Jur.2d Constitutional Law §§259-262. Due to the vague and general nature of the police power, it must give way to specific constitutional grants. In **Cooley v. Board of Wardens of Port of Philadelphia**, 12 How. 299, 12 L.Ed. 996 at 1005 (1851), the Court decided that the grant of commerce power to Congress was not by itself exclusive, but when Congress has acted, the police power of the states is subject to these actions by virtue of the Supremacy Clause. **Cooley** makes it very clear that if the Constitution does give an exclusive grant of legislative power, as this Court has ruled that it does

in admiralty, then Congress cannot re-grant the power to the states and the states cannot act within the excluded area. 12 How. at 318.

Appellant puts much faith in the law found in *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960). There are many reasons why this case does not apply. First, the Smoke Abatement Code of Detroit was a law which operated almost totally on land but did have some incidental effect on ships within the city. The Florida Act is aimed specifically at the maritime shipping industry and its operation on the open oceans and harbors. The issues in *Huron* were strictly framed under the Commerce Clause which (unlike admiralty) is not exclusively a federal domain. In addition to finding no constitutional preemption, the Court found as fact that the Detroit law dealt with an area not covered by any congressional or federal regulation.

In the present case there is a comprehensive congressional act and federal regulatory scheme specifically covering the same subject matter over which Florida seeks to assert its police power. It should be noted, too, that the Detroit law (when applied to ships at all) dealt with only one facet of one part of a ship, to-wit, the amount of smoke coming from the boiler. The Florida Act deals with equipment required to be on board, training of the crew, the financial responsibility, the conditions under which entry and unloading may occur and numerous other facets of a ship's existence and functioning. When a smoking ship is docked in a crowded city on a narrow river, and no federal remedy is available, the limited regulation of that ship by a local government to avoid the local injury is one thing. But the situation is entirely different when

the police power is invoked to sustain a statute aimed exclusively at the shipping industry where the only local concern is manifested in the phrase "destined for or leaving a Florida port." The Appellant comes nowhere near falling within the boundaries of the **Huron** case.

On page 45 of its Brief, Appellant states the rule that "The Congressional Act must specifically exclude state legislation . . ." This statement is not supported by **Northern States Power Company v. Minnesota**, 447 F.2d 1143 (8 CA, 1971), *aff'd* 31 L.Ed.2d 576 (1972), in which Minnesota asserted its police power in an effort to regulate atomic waste the Court found that Congress had preempted the area by implication, 447 F.2d at 1153. **Northern States Power** indicates that the status of the police power of a state is not made sacred by the alleged intention to regulate water pollution. This is especially true where Congress has already acted to meet the same end. The Court in **Northern States Power** found that when it chooses to act as such, Congress is the supreme authority to balance industrial progress and adequate safety standards:

" . . . Thus, through direction of the licensing scheme for nuclear reactors, Congress vested the AEC with the authority to resolve the proper balance between desired industrial progress and adequate health and safety standards. Only through the application and enforcement of uniform standards promulgated by a national agency will these dual objectives be assured. Were the states allowed to impose stricter standards on the level of radioactive waste releases discharged from nuclear power plants, they might conceiv-

ably be so overprotective in the area of health and safety as to unnecessarily stultify the industrial development and use of atomic energy for the production of electric power." **Northern States Power Co. v. Minnesota**, 447 F.2d at 1153, 1154 (1971).

The proper balance between commercial growth and protection of the environment is especially necessary in the situation of the American Merchant Marine. The present national administration has started a new program to revitalize the American merchant fleet which has slipped from number one in the world in 1945 to a third-rate power carrying less than 5 percent of American cargo moving in foreign commerce. The plans call for 300 new ships in ten years, the oil tankers being in the majority. The contracts awarded to date total 1.1 billion dollars and include the cost of government subsidies to offset the difference between construction costs in the United States and foreign shipyards.

The push by government to build a strong, needed, maritime service, is a responsibility no state or combination of states can meet. It must be a federal function to supply this national need. It is no less a federal function to supervise, police, and protect this industry. To have fifty states acting each in its own separate way, at best would produce chaos, at worst destruction.

III

CHAPTER 70-224, LAWS OF FLORIDA, VIOLATES THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION AS THE POWER OF CONGRESS TO REGULATE FOREIGN AND INTERSTATE COMMERCE IS SUPREME.

The regulation of foreign and interstate commerce is an area peculiarly limited to the federal government. Any industry as deeply involved in foreign and interstate commerce as the shipping industry is one which must function under a set of standards and regulations which are consistent and uniform throughout the nation; state regulation in this area is inconsistent with the concept of orderly operation and the free flow of such commerce; *Gibbons v. Ogden*, 9 Wheat. 1 (1824); *Norris v. City of Boston*, 7 How. 283 (1849); *The Daniel Ball*, 10 Wall. 557 (1870); *Lord v. Goodall, Nelson & Perkins Steamship Co.*, 12 Otto 541 (1880); *Hall v. DeCuir*, 5 Otto 485 (1877).

The necessity for regulation on a nation-wide scale is traced to the birth of the United States Government through congressional legislation and Supreme Court case law: 1 Stat. 55, 131; 5 Stat. 304; *Gibbons v. Ogden*, supra; *Veazie v. Moor*, 14 How. 568 (1852); *The Genesee Chief*, 12 How. 443 (1851); *The Daniel Ball*, supra.

Article I, Section 8, Clause 3, specifically provides the Congress shall have power "To regulate commerce with foreign nations, . . ." and grants to the federal government that regulatory power. This clause has been interpreted throughout the history of the Nation as a grant

of supreme regulatory power under which Congress precludes state action. The Supreme Court of the United States has consistently placed the power to regulate commerce on the navigable waters which touches foreign commerce as an area of federal control; **Gilman v. Philadelphia**, 3 Wall. 724 (1865):

"... The power to regulate commerce comprehends the control, for that purpose and to the extent necessary, of all navigable waters of the United States which are accessible from a State other than those in which they lie." **Gilman v. Philadelphia**, 3 Wall. 724.

In 1875, the Supreme Court, in voiding a New York statute attempting to regulate foreign commerce observed:

"... A regulation which imposes onerous, perhaps impossible, conditions on those engaged in active commerce with foreign nations must of necessity be national in its character ... It belongs to that class of laws which concern the exterior relation of this whole nation with other nations and governments." **Henderson v. New York (Henderson v. Wickham)** 92 U.S. 259, 274 (1876).

The case of **Lord v. Goodall, Nelson & Perkins Steamship Co.**, 12 Otto 541 (1880), treats the question of control of foreign commerce. The issue in **Lord** was whether the United States Congress could pass legislation regulating the liability of a vessel owner for cargo and passengers traveling on the high seas and within navigable waters

of the United States but engaged in maritime commerce only between ports of the same state. The court held that Congress had the power to regulate foreign commerce if the vessel traveled on the high seas:

"Navigation on the high seas is necessarily national in its character. Such navigation is clearly a matter of 'external concern,' affecting the Nation as a nation in its external affairs. It must, therefore, be subject to the national government.

"The contracts sued on do not relate to the purely internal commerce of a State, but, impliedly at least, connect themselves with the commerce of the world, because in their performance the laws of Nations on the high seas may become involved, and the United States compelled to respond." *Lord v. Goodall, Nelson & Perkins Steamship Co.*, 12 Otto 541, 544.

In *Veazie v. Moor*, 14 How. 568 (1852), the Court, through Mr. Justice Daniels, stated:

"Commerce with foreign nations must signify commerce which in some sense is necessarily connected with these nations, transactions which either immediately, or at some stage of their progress, must be extra territorial." 14 How. 568, 573.

Thus, vessels which transport cargo on the high seas come within the scope of the foreign commerce power. Appellees' vessels in the case at bar fall within the classi-

fication of being engaged in foreign commerce as developed in the cases dealing with foreign commerce. That they move in foreign commerce both between nations of the world and as vessels on the high seas comingled with other vessels is clear. The necessity to be regulated evenly must be fostered and directed by the Federal Government such that the need for uniformity will be promoted. The specific grant in the Constitution "to regulate commerce with foreign nations" was interpreted in *Board of Trustees of the University of Illinois v. The United States of America*, 289 U.S. 48 at 56, 57 (1923) as follows:

"The words of the Constitution 'comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other to which this power does not extend.' *Gibbons v. Ogden*, 9 Wheat 1, 193; 6 L.Ed. 23, 69. It is an essential attribute of the power that it is exclusive and plenary. As an exclusive power, its exercise may not be limited, qualified or impeded to any extent by state action."

In considering the Florida Act in the context of the pronouncements of the Supreme Court of the United States relative to the regulation of foreign commerce, state authority to impede, to any extent, foreign commerce is prohibited. The Appellees in the case at bar participate in foreign commerce and they and others similarly situated are in the dilemma of subjecting their total assets to unlimited liability if they suffer a catastrophe while engaged in maritime oil transportation in the waters of the State of Florida. See F.S. 376.12. Thus, to avoid the possibility of material financial destruction or impairment

because of the provisions of the Florida Act, their only reasonable option is to halt maritime commerce in Florida ports.

The Florida Act contains a number of provisions directly attempting to control areas of foreign commerce already subject to federal laws and regulations. The promulgation of operating and inspection requirements (F.S. 376.07(2)(a)) directly affect foreign commerce. Also, the statute specifically requires that all "vessels transporting pollutants within the State waters shall maintain on board such containment gear as may be required by the Department . . ." (F.S. 376.07(2)(a)). These provisions are unquestionably attempts by the State of Florida to regulate foreign commerce. When the Florida Act is considered as a whole with all its provisions, it directly intrudes into the area in which the Constitution so wisely provided for Congress to legislate, that is "regulation of foreign commerce" and, thus, the Florida Act is unconstitutional as a direct intrusion into the powers granted solely to Congress by Article I, Section 8, Clause 3.

A. The Florida Act violates the Commerce Clause of the United States Constitution as it imposes an undue burden on interstate and foreign commerce.

That a state may regulate certain areas which are within the concept of interstate commerce is without question; but a state may not impose a burden which materially affects interstate commerce in an area where uniformity of regulation is necessary; *Hall v. DeCuir*, 5 How. 485; *Southern Pacific v. Arizona*, 325 U.S. 761 (1945); *Bibb v. Navajo Freight Lines*, 359 U.S. 530 (1959).

The areas in which a state may exercise concurrent jurisdiction have been classified consistently as areas of commerce of a local character; *Cooley v. Board of Wardens*, 12 How. 299, 319 (1851); *California v. Thompson*, 313 U.S. 109 (1940); *South Carolina Highway Dept. v. Barnwell Bros.*, 303 U.S. 177 (1938); *Parker v. Brown*, 317 U.S. 341 (1942); *Toomer v. Witsell*, 334 U.S. 385 (1948); *Brotherhood of Locomotive Firemen & Enginemen v. Chicago R.I. & P.R.*, 393 U.S. 192 (1968).

The current definition of "local" may be gleaned from the recent Supreme Court of the United States decisions of *South Carolina Highway Dept. v. Barnwell Bros.*, supra, *Huron Portland Cement v. Detroit*, 362 U.S. 40, 41 (1960), and *Brotherhood of Locomotive Firemen & Enginemen v. Chicago R.I. & P.R.*, supra. In *South Carolina State Highway Dept. v. Barnwell Bros.*, supra, railroads were denoted as an area in which the commerce clause dominated, 303 U.S. 182, 186. The Court further stated that few subjects of state regulation were so peculiarly of local concern as the use of state highways. The Court noted in footnote 5, at page 303, U.S. 187, the following acceptable areas of state regulation:

"Among the state regulations materially affecting interstate commerce which this court has upheld, Congress not acting, are those which sanction obstructions in navigable rivers . . . approve the erection of bridges over navigable streams . . . control the location of docks . . . impose wharfage charges . . . and establish inspection and quarantine laws. . . ."

Each of these acceptable areas of state regulation does not operate to regulate outside the geographic boundaries of the jurisdiction. This particular fact is noted as one of the elements which the court considered in upholding the "full crew" laws in **Brotherhood of Locomotive Firemen & Enginemen v. Chicago R.I. & P.R.**, 393 U.S. 192 (1968).

The record in the case at bar reveals the inability of vessels to obtain insurance because of the Florida Act. As a result, operators of vessels are to be forced to subject their total assets to unlimited strict liability; or to the more reasonable alternative, to forego operating within the waters and ports of Florida. This is not the effect of a regulation which is solely of a "local" character, but obviously materially affects interstate maritime commerce.

The Supreme Court has enunciated a concise standard to apply when considering the validity of a state statute in relation to the commerce clause of the United States Constitution in **Pike v. Bruce Church, Inc.**, 397 U.S. 137 (1970), at page 178 as follows:

"Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." (Emphasis supplied)

The Florida Act deals with maritime commerce, which is certainly interstate maritime commerce; and, thus, applying the Pike standard, the issue is whether the state statute affects interstate maritime commerce unconstitutionally.

Under the Pike standard, the following factors should be considered:

(1) Does the Florida Act regulate evenhandedly to effectuate a legitimate local interest?

(2) Are the effects of the Florida Act only incidental on interstate commerce?

Assuming the answers to questions (1) and (2) are in the affirmative, then:

(3) Is the burden imposed on interstate commerce excessive in relation to the putative local benefits?

Placing the Florida Act into this context, the following analysis is developed:

(1) The Florida Act does not regulate evenhandedly to effect a legitimate local purpose. The Act has developed a system whereby vessels which enter Florida waters, but do not touch Florida ports, are not required to comply with the financial responsibility laws or its operational procedures and containment gear regulations while vessels "using any port in Florida" (F.S. 376.14) or "destined for or leaving a licensee's terminal facility" (F.S. 376.12) are required to comply. The statute does not evenhandedly regulate, but discriminates, and does not provide for the

enforcement of the preventive and protective regulations to a segment of transient oil-carrying vessels using State waters which did not put in at Florida ports, but merely use her waterways.

(2) Whether the effect of the State Act on interstate commerce is only incidental must be measured by the chain reaction of consequences which occur due to enforcement. The Florida Act provides for substantive State remedies in controlling vessels entering State waters. These vessels are traveling in foreign and interstate maritime commerce subject to a uniform set of regulations promulgated by the Federal Government. The creation of State substantive remedies which burdens a vessel with liability (F.S. 376.021 (5); F.S. 376.12; F.S. 376.14), beyond that imposed by the Federal Government (46 U.S.C. Subsections 181-189; 33 U.S.C. 1161 (g)), is the initial factor in development of a variety of elements which culminate in the Florida Act having a major effect on interstate maritime commerce.

That vessel owners will operate in the State waters without insurance to protect themselves from financial destruction in the event of an unfortunate catastrophe due to the unlimited strict liability imposed by the Florida Act is beyond the comprehension of sound economic judgment. Yet Florida has enacted a statute which provides not only for unlimited strict liability for clean-up costs, but also the same type of liability for environmental damage and third-party damage upon the vessel and the owners thereof (F.S. 376.11; F.S. 376.12). The State statute does not lay its foundations in a rational approach to tort liability. Strict liability, as applied in the law of torts, means that a person is liable although he has taken every precaution and is not at fault in any moral or social sense.

"But such extended responsibility may undoubtedly impose too heavy a burden upon the defendant. It is one thing to say that a dangerous enterprise must pay its way within reasonable limits, and quite another to say that it must bear responsibility for every extreme of harm that it may cause. The same practical necessity for the restriction of liability within some reasonable bounds, which arises in connection with problems of 'proximate cause' in negligence cases, demands here that some limit be set...." **Prosser, Torts**, 533 (3d ed. 1964).

In strict liability cases, the liability is limited to those injuries which are the materialization of the specific extra hazard knowingly created by the voluntary acts of the defendant, as well as to foreseeable plaintiffs, but liability is held not to extend to those situations in which an unforeseeable natural event (act of God) intervenes, or in which the unforeseeable act of the plaintiff or a third person is responsible for the harm. **Prosser, Torts**, Section 78 (3d ed. 1964).

The federal government has recognized in the Federal Water Quality Improvement Act of 1970 the uniqueness of the oil pollution field and has placed a cap on the ultimate responsibility of vessels and vessel owners to that of clean-up cost of \$100 per gross ton or 14 million dollars, whichever is lesser; 33 U.S.C. 1161(p). The field of oil pollution contains innumerable diverse factors such that each act is unique in occurrence and lacking in any means of estimate. Thus, if vessels and vessel owners are burdened with "unlimited strict liability," they must assume the worst possible combination of occurrences and conditions, and base the economic responsibility upon those considerations.

As was determined in the hearings on the Federal Water Quality Improvement Act, as noted on page 39 of the Appellant's Brief, there was found to be a limit to which marine insurance could rationally and economically insure vessels as to oil pollution.

Thus, the Florida Act places the appellees on the "horns of a dilemma": Either continue with their contracts which have been established and enter Florida waters subjecting their vessels and assets to unlimited strict liability and, in case of accident, financial destruction or impairment; or halt marine oil transportation in Florida. Either of these alternatives has a major effect on interstate commerce.

(3) The final question is whether the burden imposed on interstate commerce is excessive in relation to its claimed local benefits. The Supreme Court of the United States, in *Pike v. Bruce Church, Inc.*, 398 U.S. 137 at 142 (1970), approached this question as follows:

"... If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities...."

The concern of the State of Florida to protect its marine environmental resources both for their inherent aesthetic value and for their economic value is of the highest priority. The question is whether the State of Florida may directly preclude vessels from entering its waters; or, in the alternative, force vessel owners to play

roulette in gambling that their vessel would not be the one unfortunate enough to be the subject of an oil pollution catastrophe which would deplete or impair their resources, the risk of which is for vessel owners to operate in Florida. This burden, coupled with requirements for operating and inspection of vessels (F.S. 376.07(2)(a)), the requirement of carrying containment gear (F.S. 376.07(2)(a)), and the requirement to post evidence of financial responsibility in addition to that required by the Federal oil spill legislation create an excessive burden on interstate commerce. The Florida Act is an undue burden on interstate maritime commerce, as the prevention of pollution and clean-up of pollution may be more effectively enforced with less burden on interstate commerce; and the Florida Act is, therefore, unconstitutional as a direct conflict with the Commerce Clause, Article I, Section 8, Clause 3, of the United States Constitution.

B. The Florida Act violates the Commerce Clause of the United States Constitution as the Florida Act relates to a "national" problem requiring uniformity.

The grant of power to Congress in Article I, Section 8, Clause 3, of the United States Constitution, "To regulate commerce . . . among the several states" is plenary; *Gibbons v. Ogden*, 9 Wheat. 1 (1824). The extent to which a state may promulgate laws which affect interstate commerce has been the subject of vast litigation; *Norris v. City of Boston*, 7 How. 282; *Minnesota Rate Cases* (*Simpson v. Shepherd*), 230 U.S. 352, 399 (1912); *South Carolina Highway Department v. Barnwell Bros.*, 303 U.S. 177 (1938); *Huron Portland Cement Co. v. Detroit*, 362 U.S. 40 (1960); *Brotherhood of Locomotive Firemen and Engineers v. Chicago, R.I. & P.R.*, 393 U.S. 1972 (1968).

This option of flexibility gives the court the opportunity to consider the innumerable variables and complexities which must be reconciled in determining the effect of a state statute on interstate commerce.

The power of the state to enact laws which substantially or materially impose on the free flow of commerce or regulate those areas of national commerce where uniformity is necessary has been precluded from the time of *Gibbons v. Ogden*, *supra*, forward. See also, *Cooley v. Board of Wardens* 12 How. 299 (1851); *Minnesota Rate Cases* (*Simpson v. Shepherd*), 230 U.S. 352 (1912); *Southern Pacific v. Arizona*, 325 U.S. 761 (1945); *Bibb v. Navajo Freight Lines*, 359 U.S. 530 (1959); *Florida Lime and Avocado Growers v. California*, 373 U.S. 132 (1963); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). As stated by the Supreme Court in *Southern Pacific v. Arizona*:

"When the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation, and the consequent incentive to deal with them nationally is slight, such regulation has been generally held to be within state authority." *Southern Pacific v. Arizona*, 325 U.S. 761, 767 (1944).

Interstate commerce by sea is of a national character within the exclusive power of Congress. *Philadelphia & S. Mail SS. Co. v. Pennsylvania*, 122 U.S. 326 (1887). The power of Congress to regulate interstate commerce is exclusive when its subjects are national in character or admit of only one uniform system or plan of regulation. *Philadelphia & S. Mail SS. Co.*, *supra*; *Robbins v. Shelby*, 120 U.S. 489 (1887); *Southern Pacific Co. v. Jensen*, *supra*; *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920).

A problem is national where its solution requires uniform treatment throughout the nation and remedial legislation can only be given by Congress, the one body that can give uniform control.

In denying Arizona the power to prescribe the length of interstate trains going through that state, the United States Supreme Court reasoned that the matter of train length was not a problem for any one state to effectively control. Said the Court:

"The serious impediment to the free flow of commerce by the local regulation of train lengths and the practical necessity that such regulation, if any, must be prescribed by a single body having a nationwide authority are apparent." *Southern Pacific v. Arizona*, 325 U.S. 761, 775 (1945)

The problem presented for determination is the extent to which the State of Florida may burden maritime commerce by the enforcement of oil spillage and pollution control regulation which interferes with the uniformity of an area of interstate and foreign commerce in which Congress has already taken the initiative and which, due to the inherent aspects of the problem, requires a uniform approach on a national level.

At the time of trial in the court below, two states required evidence of financial responsibility to operate vessels transporting oil within their waters (F.S. 376.12 and Mass. St. 827, Sec. 50B). These statutes are in conjunction with and a duplication of the provisions of the Federal Water Quality Improvement Act, 33 U.S.C. 1161(p). There were five states which charged their executive branches with the promulgation of operating and inspec-

tion rules and requirements for oil transporting vessels (Maine, Title 38, Sec. 546(4)(a); Florida, F.S. 376.07; Mass. St. 837, Sec. 4.0; Act. 167, Public Acts of 1970; Michigan, Sec. 3-533 (209), C210; and Wash., RCW 88.8, 11). The Florida Act also requires the development of minimum standards as to containment equipment and crew training in the use thereof. In addition to these laws presently in force, Georgia and New York were considering oil pollution spill regulatory measures. The New York bill would have required all tankers operating in state waters to install anti-spill equipment; **Environmental Reporter, Current Development**, 46:1229 (1971).

Thus, the proliferation of oil pollution statutes by state legislatures portrays the overburdening character of the state enactments when viewed as a whole.

It is in this context that the doctrine of uniformity is invoked by the plaintiffs. The Florida Act subjects the plaintiffs to another set of regulations with which they must conform, in addition to those provided for by the Federal Water Quality Improvement Act of 1970, in order to operate in maritime commerce.

If a state cannot, as an isolated unit, cope with an economic problem, the matter will be of national concern. A state may not impose a burden which materially affects commerce in an area where uniformity of regulation is necessary. **Huron Portland Cement Co. v. Detroit**, *supra*.

The interest of the other states is nowhere more clearly demonstrated than in the fact that the states of California, Connecticut, Delaware, Georgia, Hawaii, Maryland, Massachusetts, Michigan, North Carolina, New York, Texas, Virginia, and Washington, have filed Briefs Amici Curiae in this case.

CONCLUSION

The United States Supreme Court throughout its history has been diligent in preserving the unique constitutional concept of separation of powers within our government. This diligence has been manifested by a consistent refusal by the Court to rule on the wisdom of an otherwise constitutional act of Congress.

"Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it." *United States v. O'Brien*, 391 U.S. 367, 384 (1968).

Mr. Justice Brandeis gave a long list of support for this rule in *Arizona v. California*, 283 U.S. 423 at 455 (1931). In *United States v. Pabst Brewing Co.*, 384 U.S. 546 at 552 (1966), this Court refused to rule on the wisdom of a congressional policy decision that mergers which may substantially reduce competition are forbidden. In *Ferguson v. Skrupa*, 372 U.S. 726 (1963), this Court stated that it was not to sit as a superlegislature. *McCray v. United States*, 195 U.S. 27 at 49 (1904), gives the following rule:

"The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted."

Pages 21 to 41 of the State's Brief are devoted to a detailed exposé of the reasons why the Florida Act is a better piece of legislation than the Federal laws on the same subject. The State strongly seeks to maintain that the absolute unlimited liability of the Florida Act is wiser than the limited liability and allowable defenses provided for in the congressional enactments. On page 39, the Appellant takes note of the fact that unlimited absolute liability was debated during the congressional hearings which led to the W.Q.I.A. Congress rejected this concept of oil pollution control. Possibly Congress realized that shippers could not obtain insurance if placed under unlimited, absolute liability. Possibly Congress felt the 14 million dollar limit would be sufficiently high to cover almost every spill but still prevent the total dissemination of vital shipping interest. Possibly Congress realized that

land based property owners obtain insurance to protect their property. At any rate, the point to be made is that Congress did not accept this concept and now the State wishes this Court to rule on the wisdom of the congressional action and superimpose absolute unlimited liability for oil spills where Congress specifically excluded it.

Interlaced through the entire body of the Appellant's brief is a continuing assertion that oil spills and pollution are bad and pure water is good. If this were an issue in this case the Appellee would gladly stipulate to these facts. The parade of horrors which the Appellant marches before the Court as to the various oil pollution disasters is not required to prove that oil spills are destructive. At issue in this trial is not whether oil pollution is evil (which it is), not who holds the greatest love for Florida's beautiful waters, beaches and fish (we all love them), and not what is the best method as to controlling oil pollution. The issue is who shall be the lawmaker to regulate the prevention of interstate and international oil pollution in our oceans and navigable waters. The Appellees maintain that the Constitution, both directly through the admiralty jurisdiction and indirectly through the doctrine of statutory preemption, gives the Congress the power to legislate in this area. This power is exclusive and even if it were not, Congress has acted pursuant to its constitutional powers and has covered the field.

Not only the Constitution but also the rule of reason excludes state legislation in this area. The mere fact that 13 states have filed *Amici Curiae* briefs on behalf of Florida's alleged right to legislate in this area shows that there is a desire and probability that other states will seek to legislate as Florida has if its action is allowed to stand.

Indeed, many states have already done so. See Maine Title 38 Sections 541-557 (1970); Massachusetts, Clean Water Act (1968, 1969, 1970) Annotated Laws of Massachusetts, Chapter 21 Sections 27(10), 50-52; Michigan Water Pollution Control Act of 1970, Act 167, 1970; Washington, Revised Code of Washington (RCW 90.48.315, et seq.); and Alaska, Statutes Title 46, Chapter 05 (1968, 1970).

Aside from the constitutional reasons why Florida cannot act in the field of admiralty, which is the most efficient method to combat the oil pollution hazard: (1) With a myriad of separate conflicting statutes and regulatory schemes from the 23 coastal states as well as the other states with navigable waterways; OR (2) Should the nation act as a unit to combat this national problem by congressional statute and implementing regulatory scheme? Obviously, the latter. The uniformity requirement in admiralty did not evolve by accident. Admiralty is the example **par excellence** of the type problem which causes men and states to come together and form nations. For it is not just oil spills that are of national concern, but also the industry to be governed.

Shipping by navigable water in the United States has always been controlled and fostered by the federal government. There exists no vacuum in obligations. The new federal program is complete and it is effective. If it fails—if there appears a leakage of responsibility, the breakdown can be easily detected, and any wrong duly redressed. All the people of the nation are thus served by their own design, for their own benefit, and as chartered in their own Constitution.

For the above reasons, Chapter 70-224, Laws of Florida, is unconstitutional as an attempt by the State of Florida to legislate substantial maritime law which, under Article III, Section 2, Clause 3, of the United States Constitution, is exclusively within the federal domain. The Florida Act likewise violates the Commerce Clause in that it seeks to regulate foreign and interstate commerce and is in direct conflict with federal statutes in an area which has been preempted by the federal statutes.

Respectfully submitted,

LeROY COLLINS,
of Counsel

ERVIN, VARN, JACOBS & ODOM

JOSEPH C. JACOBS
of the law firm of

ERVIN, VARN, JACOBS & ODOM
Post Office Box 1170
Tallahassee, Florida 32302
and

JOHN B. CHANDLER, JR.,
ROGERS, TOWERS, BAILEY,
JONES & GAY

Florida Title Building
Jacksonville, Florida 32202
and

STEWART D. ALLEN
Sunset House
5825 Sunset Drive
South Miami, Florida
Attorneys for Appellees

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the BRIEF OF APPELLEES has been furnished to all parties of record this 11 day of August, 1972.

Attorney

FILED

AUG 15 1972

IN THE
Supreme Court of the United States
October Term, 1972

No. 71-1082

REUBIN O'D. ASKEW, *et al.*,

Appellants,

vs.

THE AMERICAN WATERWAYS OPERATORS, INC., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

DEF OF APPELLEES AMERICAN INSTITUTE OF MERCHANT SHIPPING, ASSUR-
CEFORENINGEN GARD, ASSURANCEFORENINGEN SKULD, THE BRITANNIA
TEAM SHIP INSURANCE ASSOCIATION, LIMITED, THE JAPAN SHIP OWNERS
MUTUAL PROTECTING AND INDEMNITY ASSOCIATION, THE LIVERPOOL AND
LONDON STEAM SHIP PROTECTION AND INDEMNITY ASSOCIATION, LIMITED,
THE LONDON STEAMSHIP OWNERS' MUTUAL INSURANCE ASSOCIATION,
LIMITED, NEWCASTLE PROTECTION AND INDEMNITY ASSOCIATION, THE
NORTH OF ENGLAND PROTECTING & INDEMNITY ASSOCIATION LIMITED, THE
STANDARD STEAMSHIP OWNERS' PROTECTION AND INDEMNITY ASSOCIATION
LIMITED, THE STANDARD STEAMSHIP OWNERS' PROTECTION & INDEMNITY
ASSOCIATION (BERMUDA) LIMITED, THE STEAMSHIP MUTUAL UNDERWRITING
ASSOCIATION, LIMITED, SUNDERLAND STEAMSHIP PROTECTING & INDEMNITY
ASSOCIATION, SVERIGES ANGFARTYGS ASSURANS FORENING, THE UNITED
KINGDOM MUTUAL STEAM SHIP ASSURANCE ASSOCIATION (BERMUDA) LIM-
ITED, THE WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION AND
INDEMNITY ASSOCIATION (LUXEMBOURG), AND THEIR RESPECTIVE MEMBERS

NICHOLAS J. HEALY

29 Broadway

New York, New York 10006

GORDON W. PAULSEN

One State Street Plaza

New York New York 10004

Attorneys for Appellees

*American Institute of Merchant Shipping,
Assuranceforeningen Gard, et al.*

WIGHT, GARDNER, POOR & HAVENS

WALY & BAILLIE

WINTER, WHITE, GILLEN, HUMKEY,

KINNEY AND BOGGS, P.A.

WILEY R. VILLAREAL, JR.

EDMOND A. CONNELL

EDWARD A. KRATOVIL, JR.

of Counsel

BLEED THROUGH POOR COPY

SUBJECT INDEX

	PAGE	
Report of Opinion and Statement of Jurisdiction note 1, page 2		
The Constitutional Provision and State Statute Involved	2	
The Question Presented	3	
Statement of the Case	4	
Summary of Argument	7	
ARGUMENT:		
Preliminary Statement	10	
POINT I—No state law in the maritime field is constitutional if (1) it contravenes the essential purpose expressed by an Act of Congress, or (2) it is contrary to the general maritime law or interferes with its proper harmony and uni- formity		13
A. The Admiralty Clause, read in context with the Necessary and Proper Clause, not only gives the federal courts cognizance of all cases of admiralty and maritime jurisdic- tion but vests in those courts and in Con- gress the paramount power to determine the extent of the admiralty jurisdiction and the substantive law to be applied in the maritime area		13
1. The admiralty and maritime jurisdiction of the federal courts		13
2. The power of Congress and the federal judiciary with respect to the extent of the admiralty jurisdiction and the sub- stantive maritime law		15
B. No state legislation in the maritime field may contravene the essential purpose of an Act of Congress		20

C. State statutes may not contravene the general maritime law or, interfere with its proper harmony and uniformity	25
POINT II—The Florida Act contravenes essential purposes expressed by Acts of Congress and international conventions; it is contrary to the general maritime law and interferes with its proper harmony and uniformity	33
A. The Florida Act conflicts with federal legislation and international conventions	33
1. Federal water pollution legislation	33
2. Federal legislation and international agreements concerning construction and inspection of vessels and licensing of personnel	40
3. The United States Limited Liability Act	42
4. The Federal Wreck Statute	44
5. The Admiralty Grant of the Judicial Code	45
B. The Florida Act is contrary to and interferes with the proper harmony and uniformity of the general maritime law	46
C. The Florida Act does not fall within the scope of the "Police Power"	49
D. The Florida Act cannot be justified on Appellants' "gap" theory or their interpretation of W.Q.I.A. § 1161(o)	51
CONCLUSION	52
The decision below should be affirmed	53
Table A — Provisions of Florida Act Duplicating and Contravening General Maritime Law, Federal Statutes and International Conventions	A1
Table B — Comparison of State Water Pollution Statutes Relating to Vessels	B1

Cases Cited

	PAGE
American Airlines, Inc. v. Town of Hempstead, 272 F. Supp. 226 (E.D.N.Y. 1967).....	50
American Bridge Co. v. The Gloria O, 98 F. Supp. 71 (E.D.N.Y. 1951)	19
Benazet v. Atlantic Coastline R.R. Co., 442 F.2d 694 (2d Cir. 1971), aff'd <i>per curiam</i> , 40 U.S.L.W. 4516 (U.S. May 15, 1972)	30
Blackheath, The, 195 U.S. 361 (1904)	19
Branch v. Schumann, 445 F.2d 175 (5th Cir. 1971)	28
Butler v. Boston & Savannah Steamship Co., 130 U.S. 527 (1889)	43
C. J. Hendry Co. v. Moore, 318 U.S. 133 (1943)	50
Central States, The, 9 F. Supp. 934 (E.D.N.Y. 1935)	45
Chelentis v. Luckenbach Steamship Co., 247 U.S. 372 (1918)	9, 29
China, The, 74 U.S. 53 (1868)	19
City of Newark v. Mills (The South Shore), 35 F.2d 110 (3d Cir. 1929)	45
Clara, The, 102 U.S. 200 (1880)	47
Cleveland Terminal and Valley R.R. Co. v. Cleveland S.S. Co., 208 U.S. 316 (1908)	18
Cooley v. Board of Wardens, 53 U.S. 299 (1851) ..	13, 48
Crowell v. Benson, 285 U.S. 22 (1932)	17
Dampsk. Dannebrog v. Signal Oil & Gas Co., 310 U.S. 268 (1940)	22
Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938)	25
Fematt v. City of Los Angeles, 196 F. Supp. 89 (S.D. Cal. 1961)	19
Fireman's Fund Ins. Co. v. Standard Oil Co., 339 F.2d 148 (9th Cir. 1964)	47
Flink v. Paladini, 279 U.S. 59 (1929)	43
Foster v. United States, 156 F. Supp. 421 (S.D.N.Y. 1957)	19

Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942)	21, 29
Gibbons v. Ogden, 22 U.S. 1 (1824)	28
Guaranty Trust Co. v. York, 326 U.S. 99 (1945) ..	21
Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp., 342 U.S. 282 (1952)	30
Harrisburg, The, 119 U.S. 199 (1886)	30
Homer Ramsdell Transp. Co. v. Compagnie Generale, 182 U.S. 406 (1901)	18
Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960)	10, 22, 50
Igneri v. Cie. de Transports Oceaniques, 323 F.2d 257 (2d Cir. 1963)	20
Jumna, The, 149 Fed. 171 (2 Cir. 1906)	47
Kelly v. Washington, 302 U.S. 1 (1937)	49
Kermarec v. Compagnie Generale, 358 U.S. 625 (1959)	9, 29, 30
Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920)	9, 16, 25, 27, 51
Kossick v. United Fruit Co., 365 U.S. 731 (1961) ..	29
La Merced, 84 F.2d 444 (9th Cir. 1936)	35
Lawton v. Steele, 152 U.S. 133 (1894)	50
Lee v. New Jersey, 207 U.S. 67 (1907)	50
London Guarantee & Accident Co. v. Industrial Commission, 279 U.S. 109 (1929)	14
Lottawanna, The, 88 U.S. 558 (1875) ...	8, 13, 16, 17, 25, 33
Loughlin v. McCaulley, 186 Pa. St. 517, 40 Atl. 1020 (S.Ct. Pa. 1898)	43
Maier v. Publicker Commercial Alcohol Co., 62 F. Supp. 161 (E.D. Pa. 1945), aff'd <i>per curiam</i> , 154 F.2d 1020 (3d Cir. 1946)	35
Manchester v. Massachusetts, 139 U.S. 240 (1891) ..	50
Martin v. West, 222 U.S. 191 (1911)	18

Matter of A/S J. Ludwig Mowinckels Rederi and Dow Chemical Co., 25 N.Y. 2d 576 (1970)	21
Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970)	9, 30, 33, 51
Mormacsaga, The, 204 F. Supp. 701 (E.D. Pa. 1962)	35
Moses Taylor, The, 71 U.S. 411 (1866)	9, 14, 16, 20
Nacirema Operating Co. v. Johnson, 396 U.S. 212 (1969)	19
New Jersey Barging Corp., In re, 168 F. Supp. 925 (S.D.N.Y. 1958)	47
O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36 (1943)	19, 20
Panama R.R. Co. v. Johnson, 264 U.S. 375 (1924) ..	8, 17, 46
Petition of Highlands Nav. Corp. (The Grand Re- public—The Nassau), 29 F.2d 37 (2d Cir. 1928)	45
Piedmont, etc., Coal Co. v. Seaboard Fisheries Co., 254 U.S. 1 (1920)	22
Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953) ..	29
Richardson v. Harmon, 222 U.S. 96 (1911)	19, 43
Romero v. International Terminal Co., 358 U.S. 354 (1959)	21
Salaky v. Atlas Barge No. 3, 208 F.2d 174 (2d Cir. 1953)	47
Skiriotes v. Florida, 313 U.S. 69 (1941)	50
Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917)	9, 16, 25, 27, 30
State of California v. The Bournemouth, 307 F. Supp. 922 (C.D. Cal. 1969)	47
Thomas Barlum, The, 293 U.S. 21 (1934)	17, 18, 21
Troy, The, 208 U.S. 321 (1908)	18
United States v. Florida Power and Light Company, 311 F. Supp. 1391 (S.D. Fla. 1970)	35
United States v. The Helen, 164 F.2d 111 (2d Cir. 1947)	
United States v. Matson Navigation Co., 201 F.2d 610 (9th Cir. 1953)	19

	PAGE
United States v. Esso Standard Oil Co., 375 F.2d 621 (3rd Cir. 1967)	35
United States v. Standard Oil Co., 384 U.S. 224 (1966)	35
United States v. The Helen, 164 F.2d 111 (2d Cir. 1947)	35
Victory Carriers, Inc. v. Law, 404 U.S. 202 (1971), <i>rehearing den.</i> , 404 U.S. 1064 (1971)	16, 19
Washington v. W. C. Dawson & Co., 264 U.S. 219 (1924)	16, 25
Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310 (1955)	22, 25, 30
Workman v. City of New York, 179 U.S. 552 (1900)	28
Wyandotte Transportation Co. v. United States, 389 U.S. 191 (1967)	45

CONSTITUTION OF THE UNITED STATES

ARTICLE I, SECTION 8, CLAUSE 18 (THE NECESSARY AND PROPER CLAUSE)	3, 4, 8, 12, 14
ARTICLE I, SECTION 18, CLAUSE 3 (THE COMMERCE CLAUSE)	3, 13, 24
ARTICLE III, SECTION 2, CLAUSE 3 (THE ADMIRALTY CLAUSE)	2, 3, 4, 7-8, 12, 13, 14, 24, 27

FEDERAL STATUTES

28 U.S.C.:	
§ 1333 (Admiralty Jurisdiction Provision of Judicial Code)	9, 15, 16, 45, 46
33 U.S.C.:	
§ 407 (The Refuse Act of 1899)	34, 35

	PAGE
§§ 409-14 (The Wreck Statute)	9, 44
§§ 431-437 (1964) (The Oil Pollution Act of 1924)	34, 35
§§ 1001-15 (Act Implementing Provisions of 1954 Convention for Prevention of Pollution of the Sea by Oil)	34
§§ 1151-60 (The Federal Water Pollution Control Act)	34
§§ 1161-75 (The Water Quality Improvement Act of 1970)	3, 4, 34, 36, 43
§ 1161(b)(1)	36
§ 1161(f)(1)	36-37, 43
§ 1161(o)	51
§ 1162(a)	36
46 U.S.C.:	
§§ 183-89 (The Limited Liability Act)	9, 42, 43
§§ 221-49c (Vessel Licensing and Manning)	42
§§ 361-436 (Inspection, Construction and Alteration of Steam Vessels)	9, 40
§ 688 (The Jones Act)	29
§ 740 (The Admiralty Extension Act)	8, 17-18, 19, 20, 43
§§ 971-75 (1920 Amendments to 1910 Federal Maritime Lien Act)	22
Pub. L. No. 92-340 (July 10, 1972) (Ports and Waterways and Environmental Quality Act)	9-10, 34, 37, 41, 50, note 14
1971 U. S. CONG. & AD. NEWS, Vol. 1, p. 291 (1971 Amendment to 1910 Federal Maritime Lien Act)	22
1 STAT. 76-77 (The Judiciary Act of 1789)....	15, 20, 26
24 STAT. 329 (The New York Harbor Act of 1886) ..	33, 34
26 STAT. 453, as amended 28 STAT. 363 (The Obstruction Act of 1890)	34
36 STAT. 604 (The Federal Maritime Lien Act of 1910)	22
40 STAT. 395 (Amendment to Judiciary Act)	26
41 STAT. 1005-06 (1920 Amendments to 1910 Federal Maritime Lien Act)	22

	PAGE
61 STAT. 682 (The Water Pollution Control Compact Act)	34
75 STAT. 402 (Act Implementing Provisions of 1954 Convention for Prevention of Pollution of the Sea by Oil)	38
80 STAT. 372 (Amendments to 1961 Oil Pollution Act)	38
80 STAT. 1252 (The Clean Waters Restoration Act of 1966) (repealed)	34, 35

FEDERAL REGULATIONS

46 C.F.R. §§ 1-199	40, notes 22, 80
46 C.F.R. §§ 10.01-10.15	42, note 84

INTERNATIONAL AGREEMENTS

Oil Pollution:

- 1954 Convention for the Prevention of Pollution of the Sea by Oil, TIAS 4900, 12 UST 2989, 327 UNTS 3, *as amended* TIAS 6109, 17 UST 1523, — UNTS —37, 38, note 5
- 1969 Convention Relating to Intervention on the High Seas in Relation to Oil Pollution Casualties, Executive G, 91st Cong., 2nd Sess., *ratified* 117 Cong. Rec. S 14606-8 (daily ed. Sept. 20, 1971), *but not yet in force*38, note 5
- 1969 Convention on Civil Liability for Oil Pollution Damage, Executive G, 91st Cong., 2nd Sess., *not yet ratified or in force* (see Senate Foreign Relations Comm., Executive Report No. 92-9, "1969 Oil Pollution Conventions and Amendments," August 5, 1971, 92nd Cong., 2nd Sess.)38, 39, 40, note 5
- 1971 Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, Executive K, 92nd Cong., 2nd Sess., *not yet ratified or in force* ..39, 40, note 5

Professional Capacity of Masters and Officers:

1936 Convention Concerning the Minimum Requirement of Professional Capacity for Masters and Officers on Board Merchant Ships, USTS, No. 950; 6A BENEDICT ON ADMIRALTY 989 (7th ed. rev., by Knauth)	42
---	----

Safety of Life at Sea:

1960 SOLAS Convention, TIS 5780, 16 UST 185, 536 UNTS 27 (1965)	9, 40, note 5
---	---------------

STATE STATUTES

Florida Statutes § 371.52 (1970)	28
Chapter 376, Florida Statutes (1970)	2, 36
§ 376.7(2)(a), (c) and (g) (1970)	41
§ 376.11	note 60
§ 376.11(6)(c) (1970)	45, 46
§ 376.12 (1970)	47, note 60
§ 376.15 (1970)	45

For detailed citation and comparison of provisions of water pollution statutes of Alabama, Alaska, California, Connecticut, Delaware, Florida, Georgia, Massachusetts, Michigan, New York, North Carolina, Virginia and Washington purporting to affect the admiralty jurisdiction see Table B.

STATE REGULATIONS

State of Florida, Department of Natural Resources Regulations, Chapter 16B-16.0	3, 5
---	------

CONGRESSIONAL AND EXECUTIVE MATERIALS

Senate:	
117 Cong. Rec. S 14606-8 (1971)	ly ed. Sept. 20, notes 5, 66, 68

Executive G, 91st Cong., 2nd Sess. . . notes 5, 67, 69, 70	
Executive K, 92nd Cong., 2nd Ssee. . . . notes 5, 72, 73	
S. Doc. No. 39, Constitution of the U. S. A. Annotated, 88th Cong. 1st Sess. (N. Small ed. 1964)	note 90
Senate Foreign Relations Committee, Executive Report No. 92-9, "1969 Oil Pollution Conven- tions and Amendments", August 5, 1971, 92nd Cong., 1st Sess.	note 5, 71

TREATISES AND LAW REVIEWS

Benedict, <i>The Law of American Admiralty</i> (6th ed. by Knauth, 1940)	21
Benedict, <i>The Law of American Admiralty</i> (7th ed. rev., by Knauth)	42
Bergren, <i>Effects of Recent Legislation upon the Ad- miralty Law</i> , 17 Geo. Wash. L. Rev. 353 (1949)	19
Currie, D., <i>Federalism and the Admiralty: "The Devil's own Mess,"</i> 1960 Sup. Ct. Rev. 158 . . 30, note 44	
Fauver, <i>The Extension of Admiralty Jurisdiction to Include Amphibious Torts</i> , 37 Geo. L. J. 252 (1949)	19
Gilmore & Black, <i>The Law of Admiralty</i> (1957)	21, 46
Healy, <i>The International Convention on Civil Lia- bility for Oil Pollution Damage</i> , 1969, 1 J. Mar. L. & Comm. 317 (1970)	note 78
Healy & Paulsen, <i>Marine Oil Pollution and the Water Quality Improvement Act of 1970</i> , 1 J. Mar. L. & Comm. 537 (1970)	note 78
Kashiwa, S., <i>The Refuse Act and Protection of Water Quality</i> , 9 Houst. L. Rev. 676 (1972)	36
Sweeney, <i>Oil Pollution of the Oceans</i> , 37 Ford. L. Rev. 155 (1968)	47

IN THE
Supreme Court of the United States
October Term, 1972

No. 71-1082

REUBIN O'D. ASKEW, *et al.*,

Appellants,

VS.

THE AMERICAN WATERWAYS OPERATORS, INC., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF OF APPELLEES AMERICAN INSTITUTE OF MERCHANT SHIP-
PING, ASSURANCEFORENINGEN GARD, ASSURANCEFORENINGEN
SKULD, THE BRITANNIA STEAM SHIP INSURANCE ASSOCIATION,
LIMITED, THE JAPAN SHIP OWNERS MUTUAL PROTECTING AND
INDEMNITY ASSOCIATION, THE LIVERPOOL AND LONDON STEAM
SHIP PROTECTION AND INDEMNITY ASSOCIATION, LIMITED, THE
LONDON STEAMSHIP OWNERS' MUTUAL INSURANCE ASSOCIATION,
LIMITED, NEWCASTLE PROTECTION AND INDEMNITY ASSOCIA-
TION, THE NORTH OF ENGLAND PROTECTING & INDEMNITY
ASSOCIATION LIMITED, THE STANDARD STEAMSHIP OWNERS'
PROTECTION AND INDEMNITY ASSOCIATION LIMITED, THE
STANDARD STEAMSHIP OWNERS' PROTECTION & INDEMNITY
ASSOCIATION (BERMUDA) LIMITED, THE STEAMSHIP MUTUAL
UNDERWRITING ASSOCIATION, LIMITED, SUNDERLAND STEAM-
SHIP PROTECTING & INDEMNITY ASSOCIATION, SVERIGES ANG-
FARTYGS ASSURANS FORENING, THE UNITED KINGDOM MUTUAL
STEAM SHIP ASSURANCE ASSOCIATION (BERMUDA) LIMITED, THE
WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION AND
INDEMNITY ASSOCIATION (LUXEMBOURG), AND THEIR RESPEC-
TIVE MEMBERS

The Constitutional Provision and State Statute Involved¹

The only legislation under direct consideration on this appeal is the Florida Oil Spill Prevention and Pollution Control Act² (hereinafter "Florida Act"), the text of which is set forth at A56-73, and the Regulations issued thereunder,³ set forth at A73-74. The court below held this legislation invalid in its entirety, as in violation of the Admiralty Clause of the United States Constitution: "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction."⁴

Peripherally involved are a number of international maritime conventions⁵ to which the United States is a party and the vast body of "congressional enactments and

¹ A reference to the opinion on the merits of the appeal and the constitutional grounds are contained in the opinion below and a statement of jurisdictional grounds are contained in the Appellants' Brief, pp. 1-2, and are omitted here pursuant to Rule 4.

² Chapter 376, FLORIDA STATUTES (1970).

³ State of Florida, Department of Natural Resources Regulations, Chapter 16B-16.08.

⁴ CONSTITUTION, ARTICLE II.

⁵ 1954 Convention For the Prevention of Pollution of the Sea by Oil, TIAS 4900, 12 UST 298; 1960 Safety of Life At Sea Convention (SOLAS), TIAS 5780, 16 UST 185, 536 UNTS 27; 1969 Convention Relating to Intervention on the High Seas in Relation to Oil Pollution Casualties, Executive G, 91st Cong., 2nd Sess., ratified 117 Cong. Rec. S14606-8 (daily ed. Sept. 20, 1971), but not yet in force; 1969 Convention on Civil Liability for Oil Pollution Damage, Executive G, 91st Cong., 2nd Sess., not yet ratified or in force (see Senate Report No. 92-9, "1969 Oil Pollution Conventions and Amendments", August 5, 1971, 92nd Cong., 2nd Sess.); 1971 Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, Executive K, 92nd Cong., 2nd Sess., not yet ratified or in force.

administrative regulations''⁶ which, pursuant to the "Necessary and Proper Clause",⁷ read in context with the Admiralty Clause, have effected changes in the corpus of maritime law as "found initially in the European authorities" and "augmented from time to time by the federal judiciary to accommodate needs distinctive to this nation".⁸

As the court below stated, the validity of the Florida Act was also challenged on the ground that it violated the Commerce Clause,⁹ and "Certain provisions of the Act [were] under piecemeal attack on Fourteenth Amendment due process and equal protection grounds."¹⁰ However, having held the Act violative of the Admiralty Clause, it found it unnecessary to discuss these other challenges.¹¹

The Question Presented

As stated at pp. 4 and 5 of their Motion to Affirm, these Appellees disagree with Appellants' inclusion of their second question (Brief, p. 2), since an analysis of the opinion of the court below reveals that its decision was *not* based on preemption by the Federal Water Quality Improvement Act of 1970, but solely on the ground that the Florida Act was unconstitutional under the Admiralty Clause.¹² Accordingly, these Appellees maintain that only a single question is presented by this appeal:

Whether the District Court erred in declaring the Florida Oil Spill Prevention and Pollution Control Act

⁶ Opinion below, A41.

⁷ CONSTITUTION, ARTICLE I, SECTION 8, CLAUSE 18.

⁸ Opinion below, A41.

⁹ CONSTITUTION, ARTICLE I, SECTION 18, CLAUSE 3.

¹⁰ Opinion below, A40.

¹¹ *Id.*

¹² See opinion below, A47. The Federal Water Quality Improvement Act is found at 33 U.S.C. §§ 1161-75.

unconstitutional on the ground that under Article III, Section 2, of the Constitution of the United States, Congress and the federal judiciary have paramount power in the maritime field, and the Act was an unwarranted intrusion into the federal domain.

Statement of the Case ¹³

Pursuant to power derived from the Admiralty Clause, read in context with the Necessary and Proper Clause, Congress has enacted a substantial amount of legislation, including the Water Quality Improvement Act of 1970¹⁴ (hereinafter "W.Q.I.A."), specifically relating to the prevention of pollution of the navigable waters of the United States by vessels, and to civil and criminal liability for such pollution as may occur. Areas not covered by federal legislation are governed by a sizable body of general maritime law, as defined by the federal courts.

Dissatisfied with the federal law in this field, the Florida Legislature enacted the Florida Act less than three months after W.Q.I.A. became law. (Appellants' Brief, p. 6). Annexed as Table A is a Comparative Table setting forth those provisions of the Florida Act which are of principal concern on this appeal, and the corresponding provisions of federal laws and international conventions with which they are in conflict. It will be seen that the Act is most comprehensive, and purports to give Florida officials broad powers to control vessels engaged in interstate and international, as well as intrastate commerce, and to impose new

¹³ These Appellees disagree with substantial portions of Appellants' Statement, and are presenting their own, pursuant to Rule 40.3 of this Court.

¹⁴ 33 U.S.C. §§ 1161-75; *see also* Ports and Waterways Safety and Environmental Quality Act, Pub. L. No. 92-340 (July 10, 1972).

liabilities differing widely from those imposed by the general maritime law and federal legislation.

Although shortly after the effective date of the Florida Act implementing regulations were drafted, relating not only to the Act's financial responsibility provisions, but to those which dealt with manning of vessels, reporting of discharges, containment gear, and other matters, apparently the only regulations actually adopted prior to the entry of the temporary restraining order herein concerned financial responsibility. (A73-74). These provided that no vessel carrying oil, gasoline, pesticides, ammonia, chlorine or other hazardous materials as cargo would be permitted to enter any Florida port for any purpose on or after March 1, 1971, without the required certificate of financial responsibility.¹⁵ Although the Regulations officially became effective on that date, the Florida authorities let it be known that they would not actually prevent vessels lacking the required certificates of financial responsibility from using Florida ports until March 15th. Between March 1st and March 15th, however, warning citations were issued to vessels using Florida ports without having such certificates on board. (T 91)

These proceedings, seeking to have the Florida Act declared unconstitutional, and to have the state authorities restrained from enforcing it, were instituted March 9, 1971 by The American Waterways Operators Inc., the national trade association of the barging and towing industry, and various of its members. Their complaint alleges (A6) and the answer admits (A27), that the Department of Natural Resources acting through its agents, officials and employees, had notified the public and plaintiffs that it was presently implementing, administering and enforcing the provisions of the Florida Act and would implement, ad-

¹⁵ State of Florida, Department of Natural Resources Regulations, Chapter 16B-16.08(1); see A73.

minister and enforce the financial responsibility Regulations issued thereunder after March 15, 1971, unless the state authorities were restrained by the district court, and that the authorities were presenting warning citations to plaintiffs, and to others similarly situated, for alleged violations of the Florida Act and Regulations.¹⁶

On March 11, 1971, these Appellees (American Institute of Merchant Shipping [hereinafter "AIMS"] and 15 ship-owners' "protection and indemnity" insurance associations [hereinafter "P. & I. Associations"], and their respective members) moved for leave to intervene as plaintiffs. A similar motion was made by Appellees Suwannee Steamship Co. and Commodores Point Terminal Co. Both motions were granted on consent. (T 11-14)

AIMS, the national trade association of the American steamship industry, is composed of 35 American companies owning and operating approximately 520 United States flag ocean-going vessels of all types engaged in the domestic and foreign trades. (Intervening Complaint [A16]).

The 15 P. & I. Associations are composed of the owners and operators of approximately 75% of the world's ocean-going tonnage, flying the flags of almost every maritime country, including about 4 million tons under the American flag. The members of each of the Associations mutually insure one another on the indemnity principle, through the medium of their particular association, against various liabilities arising out of the ownership and operation of their vessels, including liability for pollution damage caused by the discharge of oil and other substances. As of March 11, 1971, a substantial number of vessels owned or operated by members of the Associations had scheduled calls of their vessels at Florida ports. (Motion of AIMS and the P. & I. Associations for leave to intervene, granted

¹⁶ See, e.g., T 91 where Eastern Seaboard Petroleum's Mr. Connolly testified that a warning citation had been issued on March 1st.

on consent [Record, Doc. No. 3]; and see Intervening Complaint [A16, 17] and Appellants' Brief, p. 7).

In their intervening complaint, AIMS and the P. & I. Associations asked that the Florida Act be declared unconstitutional, and therefore null and void and of no effect insofar as it purported to bear on the movement of vessels engaged in maritime commerce, and sought a permanent injunction against enforcement of the Act and any Regulations issued thereunder. (A10)

Following a hearing, a temporary restraining order was issued. A three-judge court was then convened, and after a further hearing, that court handed down its decision (A39-55), declaring the Florida Act an unconstitutional intrusion into the federal maritime domain and permanently enjoining its enforcement.

The three-judge court further held that despite a severability clause, the Florida Act must fall in its entirety, because if the invalid provisions were deleted the Act "would not comprise a coherent legislative scheme". (A47) Appellants have conceded this point. (Brief, p. 8)

The Florida authorities appealed the decision directly to this Court. On March 20, 1972, AIMS and the Associations, joined by Appellees Suwannee Steamship Co. and Commodores Point Terminal Corporation, moved to affirm. On April 17, 1972, this Court noted probable jurisdiction, without referring to the motion.¹⁷

Summary of Argument

AIMS and the P. & I. Associations' Argument may be summarized in the form of a conventional syllogism, the major premise whereof is that under the Admiralty Clause of the United States Constitution, no state laws in the mari-

¹⁷ 40 U.S.L.W. 3497 (April 18, 1972).

time field are valid if (1) they contravene the essential purpose expressed by an Act of Congress, or (2) they are contrary to the general maritime law or interfere with its proper harmony and uniformity (Point I, pp. 13 to 33, *infra*); the minor premise is that the Florida Oil Spill Prevention and Pollution Control Act does both (Point II, pp. 33 to 52, *infra*). The conclusion therefore follows that the Act is unconstitutional, as the court below has held, and its decision should therefore be affirmed.

I

The Admiralty Clause is not merely a grant of jurisdiction in admiralty and maritime cases to the federal judiciary; while the clause is couched in terms of judicial power, by implication it authorizes the federal courts to define the general maritime law which is to prevail throughout the United States and, when read in context with the "Necessary and Proper" Clause, it grants to Congress paramount power to legislate in the maritime field. *The Lottawanna*, 88 U.S. 558 (1875).

The maritime law is subject to modification by Congress "as experience or changing conditions might warrant". *Panama R. R. Co. v. Johnson*, 264 U.S. 375 (1924). Typical of such legislation is the Act for the Extension of Admiralty Jurisdiction¹⁸ (hereinafter "Admiralty Extension Act"), which brings within the admiralty jurisdiction claims for injuries to persons or property on land, caused by vessels afloat in the navigable waters of the United States, and makes them subject to substantive maritime law. Therefore, not only claims for water pollution and pollution damage to other vessels, but also claims for pollution damage to shore side property caused by vessels are subject to federal maritime law.

¹⁸ 46 U.S.C. § 740.

Since federal power in the maritime field is paramount, state statutes in the field are invalid if they contravene federal legislation. *The Moses Taylor*, 71 U.S. 411 (1866). State statutes are likewise invalid if they contravene the general maritime law or interfere with its proper harmony and uniformity. *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920). The same principle applies to non-statutory rules of law adopted by state courts. *Chelentis v. Luckenbach Steamship Co.*, 247 U.S. 372 (1918); *Kermarec v. Compagnie Generale*, 358 U.S. 625 (1959); and see *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). When the area is one covered neither by federal legislation nor by a previously announced rule of the general maritime law, this Court will fashion such a rule, in the interest of nationwide harmony and uniformity. See *Kermarec v. Compagnie Generale*, *supra*; *Southern Pacific Co. v. Jensen*, *supra*.

I I

The Florida Act contravenes a number of federal statutes and international conventions; it is contrary to the general maritime law and interferes with its proper harmony and uniformity. A comparative table illustrating the more important of these conflicts is annexed hereto as Table A. Among the federal statutes with which the Florida Act conflicts are several relating to water pollution;¹⁹ the Limited Liability Act;²⁰ the Judicial Code;²¹ the statutes relating to construction, inspection and manning of vessels;²² the Wreck Statute,²³ and the Ports and

¹⁹ See pp. 33-34, *infra*, and notes 45-54.

²⁰ 46 U.S.C. §§ 183-89.

²¹ 28 U.S.C. § 1333.

²² 46 U.S.C. §§ 361-436, and see 46 C.F.R. §§ 1-199.

²³ 33 U.S.C. §§ 409-14.

Waterways Safety and Environmental Quality Act.²⁴ The international conventions with which the Florida Act conflicts include several relating to water pollution²⁵ and the Safety of Life at Sea Convention.²⁶

The Florida Act cannot be justified under the "police power". *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960), on which Appellants so heavily lean, is readily distinguishable; the case involved a municipal ordinance imposing a nominal fine and a brief jail sentence for smoke emission. The Florida Act, on the other hand, would, if valid, constitute a highly elaborate legislative program covering almost every facet of water pollution, and would impose an intolerable burden on intrastate, interstate and international maritime commerce.

The provisions of the Florida Act are concededly non-severable,²⁷ and the decision of the court below declaring it unconstitutional in its entirety and enjoining its enforcement should therefore be affirmed.

ARGUMENT

Preliminary Statement

Appellants argue (Brief, pp. 23-25) that "The subject [of this appeal] is water and the need to conserve it." AIMS and the P. & I. Associations most emphatically disagree. There is no controversy whatever concerning the need for conservation of our water resources; broad, enforceable and uniform national laws and international conventions designed to improve the quality of water and to

²⁴ Pub. L. No. 92-340 (July 10, 1972).

²⁵ See note 5, *supra*.

²⁶ TIAS 5780, 16 UST 185, 536 UNTS 27 (1965).

²⁷ Appellants' Brief, p.8.

provide machinery for cleaning up discharges of oil and other pollutants have received the enthusiastic support of all responsible members of the maritime community.

Ecology is *not* the subject of this appeal; the sole question is whether or not under the Admiralty Clause of the United States Constitution the Florida Legislature had the right to enact legislation purporting, among other things, to give state employees power to board and inspect domestic and foreign vessels entering Florida waters; to prohibit entry of vessels not manned, equipped or seaworthy to the satisfaction of state employees, even though they might meet federal and international requirements; to prohibit the use of Florida ports to domestic and foreign vessels unless their owners or operators provided state officials with satisfactory evidence of financial responsibility; to impose liabilities differing widely from those established under the general maritime law, and to give a state department exclusive jurisdiction to decide, administratively, whether a recovery by the State for water pollution (liability for which the Florida Act would make absolute) should, as a matter of "privilege", but not of right, be waived if the department should find that the occurrence was caused by an act of God, war, government or a third party.

Appellants' Brief contains a great many inaccurate statements concerning the cost of cleaning up discharges of oil, the TORREY CANYON incident, the litigation which followed it, and other factual matters. These are, however, entirely irrelevant to the sole issue which this Court is called upon to decide, and therefore AIMS and the P. & I. Associations consider it unnecessary to answer them specifically. The need for conservation of our national water and other resources is fully recognized; the issue is simply whether water conservation legislation affecting vessels employed on navigable waters of the United States should become the province of the legislatures of each of the states, or whether it should be left in the federal domain.

AIMS and the Associations submit that the answer to this question is entirely clear: While the states are free to enact legislation in any sphere, including the ecological, if it does not intrude in the federal domain, under the Admiralty Clause of the Constitution (read in context with the Necessary and Proper Clause), only Congress has the power to legislate substantively with respect to vessels employed on waters within the admiralty and maritime jurisdiction of the United States, in international, interstate, or even intrastate commerce, except in areas of purely local concern.

Appellants (Brief, p. 40) seem to be under the impression that nothing but the profit motive brings vessels carrying oil and other pollutants to Florida ports. Aside from the fact that by no means every voyage a vessel makes results in a profit, the ultimate reason why vessels come to the ports of Florida—or any other state—is of course the public's demand for water-borne products. The very serious energy shortage which the United States is facing is a matter of common knowledge. Oil and other commodities which have the potential to cause water pollution are brought here in an effort to satisfy the public's demand for energy, and if the carrier, or the exporter, or the importer is able to make a profit on his services, this is not to be condemned.

POINT
The same field is constitutional
essential purpose expressed
it is contrary to the gen-

No state law in the maritime with its proper har-
if (1) it contravenes the es
by an Act of Congress, or (2
eral maritime law or interferead in context with the
mony and uniformity. not only gives the federal

A. The Admiralty Clause, courts and in Congress the
Necessary and Proper Clause, the extent of the admiralty
courts cognizance of all cases: law to be applied in the
jurisdiction but vests in those
paramount power to determine
jurisdiction and the substantive jurisdiction of the fed-
maritime area.

1. The admiralty and mari-urt has recognized that the
eral courts. ime field is vested in Con-

From the beginning, this C. Some of the earlier deci-
paramount power in the mari'ardens, 53 U.S. 299 (1851),
gress and the federal judiciary²⁸ of the Constitution as the
sions, e.g., *Cooley v. Board of* hritime matters. However,
looked to the Commerce Clause (1875), and scores of cases
basis of federal authority in aCourt have recognized the
The Lottawanna, 88 U.S. 558 urce of federal power. The
decided subsequently by this from the Admiralty Clause,
Admiralty Clause as the true s Commerce Clause, has two
fact that the power is derived authority is paramount, not
and is not dependent upon the al and interstate maritime
significant results: (1) federal amerce on navigable waters
only with respect to internati) in any area wherein Con-
commerce, but to intrastate co ime commerce is subject to
of the United States as well; defined by the federal judi-
gress has not legislated, mari
the general maritime law, as

SECTION 8, CLAUSE 3.

²⁸ CONSTITUTION, ARTICLE I, S

ciary, rather than to state law, unless the area is one of purely local concern and does not require nation-wide harmony and uniformity. *London Guarantee & Accident Co. v. Industrial Commission*, 279 U.S. 109, 124 (1929). In the cited case, this Court said, in holding a state compensation statute inapplicable to a seaman:

“Another objection to the admiralty jurisdiction here is that the vessel was not engaged in interstate or foreign commerce. It was employed only to run from shore to Santa Monica bay, 5 or 10 miles to the deep-sea fishing place, and then return, and all within the jurisdiction of California. This argument is a complete misconception of what the admiralty jurisdiction is under the Constitution of the United States. Its jurisdiction is not limited to transportation of goods and passengers from one state to another, or from the United States to a foreign country, but depends upon the jurisdiction conferred in article 3, § 2, extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction.”

It is true that the Admiralty Clause is couched in terms of federal *judicial* power: “The judicial Power shall extend * * * to all Cases of admiralty and maritime Jurisdiction * * *”. Whether the use of the word “all” was intended to make the jurisdiction of the federal courts in “Cases of admiralty and maritime Jurisdiction” exclusive, or whether it was simply intended to invest the federal courts with jurisdiction of whatever “admiralty and maritime” cases might be brought before them, is a subject on which there has been much debate. The correct view, it is submitted, is that the Admiralty Clause itself did not make the jurisdiction of the federal courts in admiralty cases exclusive, but that the Clause, read in context with the Necessary and Proper Clause, empowered Congress to make it so. See *The Moses Taylor*, 71 U.S. 411 (1866). With respect to civil admiralty cases, Congress exercised

its power immediately; the Judiciary Act of 1789²⁹ provided, in Section 9, that "the district courts * * * shall also have *"exclusive"*³⁰ original cognizance of all civil causes of admiralty and maritime jurisdiction * * *". To make it clear, however, that "civil causes of admiralty and maritime jurisdiction" referred only to maritime cases wherein an admiralty remedy was sought, Congress followed the quoted language with the now famous "saving to suitors" clause: "saving to suitors, in all cases, the right of a common law remedy, when the common law is competent to give it * * *". The modernized version of the exclusive grant of civil admiralty jurisdiction to the district courts is now found in Title 28 U.S.C. § 1333, the pertinent part of which provides:

"The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

2. *The power of Congress and the federal judiciary with respect to the extent of the admiralty jurisdiction and the substantive maritime law.*

Appellants suggest (Brief, p. 50) that the Admiralty Clause was intended to be nothing more than a grant of judicial power, i.e., that while it gives the federal judiciary cognizance of cases of admiralty and maritime jurisdiction, it does not, by implication, vest paramount power over the substantive maritime law in the Federal Government. In so suggesting, they are in effect seeking to have this Court overrule a long line of its own decisions handed down over the past century, holding that under the Admiralty Clause, in areas which are not of purely local concern, only the Federal Government has the power to determine the

²⁹ 1 STAT. 76-77.

³⁰ Emphasis throughout is ours.

maritime law. If these decisions, which are discussed at pp. 25-30, *infra*, were to be overruled, it would reopen the long since answered questions:

(1) Who did the authors of the Constitution intend should decide what are the "cases of admiralty and maritime jurisdiction" to which the federal judicial power was to extend?

(2) What substantive law applied to those cases? What law did they intend should be applied to those cases?

As this Court has repeatedly found, the plain answer to these questions is of course that the authors of the Constitution and the substantive law extent of the admiralty jurisdiction should be determined by Congress and the federal courts. *The Lottawanna*, 88 U.S. 558, 574-75 (1875); *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); *Washington v. W. C. Dawson & Co.*, 264 U.S. 219 (1924); *Victory Carriers, Inc. v. Law*, 404 U.S. 1064 (1971), rehearing denied, 404 U.S. 202 (1971), to concede this; at Brief, p. 22, they state that "It is true that Congress alone may regulate maritime commerce".²¹

In arguing that state legislation such as the Florida Act is valid under the "saving to suitors" clause of Title 28 U.S.C. § 1333, Appellants lose sight of the fact that the clause is not a constitutional provision, but merely part of an Act of Congress defining the jurisdiction of the federal district courts. What is "saved" is simply the right of a suitor to pursue a common law type remedy on a maritime cause of action in a non-admiralty court, if a common law type remedy is available; the clause does not "save" to the states any right to legislate on matters of substantive maritime law. See *The Moses Taylor*, *supra*, p. 14.

²¹ See also Appellants' Brief, p. 54; but see p. 76.

The effect of the Admiralty Clause was clearly explained by this Court almost a century ago in *The Lottawanna*, *supra*, at pp. 574-75:

"That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction' * * *. One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states."

This Court has repeatedly held that the maritime law as it existed in 1789 was not to remain forever unaltered but was instead to be subject to modification by Congress "as experience or changing conditions might warrant". *Panama R.R. Co. v. Johnson*, 264 U.S. 375 (1924); *Crowell v. Benson*, 285 U.S. 22, 39 (1932); *The Thomas Barlum*, 293 U.S. 21, 23 (1934).

A typical example of such federal legislation is the Admiralty Extension Act,³² the constitutionality whereof is questioned by Appellants, for the first time, in their Brief (pp. 52-55), contrary to Rule 40.1(d)(2). The Act provides, in pertinent part:

"The admiralty and maritime jurisdiction of the United States shall extend to and include all cases

³² 46 U.S.C. § 740.

of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water * * *."

The Admiralty Extension Act is a plainly valid exercise of Congress' power to "alter, qualify or supplement" the substantive maritime law "as experience or changing conditions might require". *The Thomas Barlum*, *supra*, p. 17. Before 1948, federal jurisdiction in most maritime tort cases was limited to torts consummated on navigable waters. This jurisdictional limitation not infrequently led to multiplicity of suits and sometimes produced disparate and highly inequitable results. For example, in a vessel-bridge collision, liability for damage to the vessel was within the admiralty jurisdiction and governed by the general maritime law, while liability for the injury to the bridge was not within the jurisdiction of the admiralty court, and was governed by state law. *Cleveland Terminal and Valley R.R. Co. v. Cleveland S.S. Co.*, 208 U.S. 316 (1908); *The Troy*, 208 U.S. 321 (1908); *Martin v. West*, 222 U.S. 191 (1911). Despite contributory negligence, the shipowner could sue in admiralty and could recover part of his damages under the more equitable maritime rule, if the bridge were found at fault. The bridge owner, however, could not sue in admiralty, and would be barred from recovery under the common law rule if both vessel and bridge were found negligent. He would also be left without a remedy against the owner or operator of the vessel, if it developed that the casualty was caused by the sole fault of a "compulsory" pilot. *Homer Ramsdell Transp. Co. v. Compagnie Generale*, 182 U.S. 406, 416 (1901).

Experience and changing conditions—here the advent of steam and the utilization of steel in the construction of vessels, and the resulting increase in the capability of a vessel to injure persons and property on land—accentuated this disparity and pointed to the need for supplementing the maritime law in order that it might cover not only injuries to vessels and persons on board them caused by the negligent operation of land structures, but also injuries caused by vessels to persons and property on shore. This finally led to passage of the Admiralty Extension Act, with the result that the bridge owner may now recover at least part of his damages, despite contributory fault, and if the fault is solely that of a compulsory pilot, he may recover full damages in an action *in rem*, under the rule of *The China*, 74 U.S. 53 (1868).

The Admiralty Extension Act has been held constitutional in several lower court decisions. *United States v. Matson Navigation Co.*, 201 F.2d 610, 614-16 (9th Cir. 1953); *American Bridge Co. v. The Gloria O*, 98 F. Supp. 71, 73-74 (E.D.N.Y. 1951); *Fematt v. City of Los Angeles*, 196 F. Supp. 89, 93 (S.D. Cal. 1961); and see *Bergren, Effects of Recent Legislation upon the Admiralty Law*, 17 Geo. Wash. L.Rev. 353 (1949); Fauver, *The Extension of Admiralty Jurisdiction to Include Amphibious Torts*, 37 Geo. L.J. 252 (1949). While this Court has not directly passed upon the constitutionality of the Act, Mr. Justice White's opinions in *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 222 (1969), and *Victory Carriers, Inc. v. Law*, 404 U.S. 202 (1971), rehearing den. 404 U.S. 1064 (1971), appear to subsume its validity.

It should be noted that quite apart from the Admiralty Extension Act, some torts consummated on land are within the admiralty jurisdiction. *The Blackheath*, 195 U.S. 361 (1904); *Richardson v. Harmon*, 222 U.S. 96 (1911); *Foster v. United States*, 156 F. Supp. 421 (S.D.N.Y. 1957); and see *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318

U.S. 36 (1943); *Igneri v. Cie. de Transports Oceaniques*, 323 F.2d 257 (2d Cir. 1963).

Congress is of course not entitled to invoke the Admiralty Clause in an attempt to legislate on matters which are plainly non-maritime. But this is far from saying that it may not, so long as it acts within the maritime sphere, bring within the admiralty jurisdiction of the federal courts and the coverage of substantive maritime law matters which were considered outside the admiralty jurisdiction in 1789. The Admiralty Extension Act is plainly within the maritime sphere; it relates only to injuries to persons and property caused by vessels afloat on navigable waters. It is remedial legislation of the most advanced sort, and has, during the quarter century of its existence on the statute books, proven its worth in the avoidance of multiplicity of suits and the inequities it was designed to remedy. If Appellants' suggestion were followed, and the Admiralty Extension Act were declared unconstitutional, these beneficial results would immediately disappear, and the law relating to "amphibious" torts would revert to the chaotic condition it was in before 1948.

B. No state legislation in the maritime field may contravene the essential purpose of an Act of Congress.

From the rule that Congress has paramount power in the maritime field it follows, as a corollary, that state statutes are invalid if they contravene federal legislation in the field. They may not, for example, authorize civil admiralty proceedings *in rem* in the state courts, because Congress, in enacting the Judiciary Act of 1789,³³ made the jurisdiction of the federal district courts in such proceedings exclusive. *The Moses Taylor*, 71 U.S. 411 (1866). The provisions of a state arbitration statute may not be

³³ 1 STAT. 76-77.

applied in a state court proceeding to enjoin enforcement of the arbitration clause of a maritime contract on grounds of time bar; the question of time bar is governed by the Federal Arbitration Act, whereunder all issues, including the issue of timeliness, must be left to the arbitrators. *Matter of A/S J. Ludwig Mowinckels Rederi and Dow Chemical Co.*, 25 N.Y. 2d 576 (1970). In that case the New York Court of Appeals, citing *The Thomas Barlum*, 293 U.S. 21 (1934); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942); *Romero v. International Terminal Co.*, 358 U.S. 354 (1959) and *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), held that although the Federal Judiciary Act provides that suitors may pursue their remedies in the state courts, "despite this grant of concurrent jurisdiction, the state courts are bound to apply Federal law in such disputes in order to secure a single and uniform body of maritime law", and that although the saving clause permits an action under federal maritime law to be brought in a state court, "it cannot limit the substantive rights of parties, nor, it seems, can it apply its own rules of procedure if those rules would significantly affect the result of the litigation, i.e., would be outcome determinative".³⁴ See also, Gilmore & Black, *The Law of Admiralty* (1957), p. 43; 1 Benedict, *The Law of American Admiralty* (6th ed. by Knauth, 1940), pp. 13-15.

Even in those closely circumscribed areas in the maritime law which are purely of local concern, and wherein the states are therefore free to act in the absence of federal legislation, once the area is occupied by Congress, state statutes covering the area are thereupon immediately superseded. Thus, prior to 1910 there was no federal legislation relating to maritime liens for repairs, supplies and other necessities furnished to vessels in their home ports. The matter was, however, considered of purely local concern and the state legislatures were therefore permit-

³⁴ 25 N.Y. 2d at 581; 307 N.Y.S. 2d at 663.

ted to enact legislation creating maritime liens on domestic vessels for necessities furnished in their home ports.³⁵ (Such liens could of course be enforced only in the federal district courts, since only those courts had power to grant admiralty type remedies, particularly the remedy of a proceeding *in rem* to enforce a maritime lien.) In 1910, however, Congress enacted a Federal Maritime Lien Act,³⁶ which was subsequently amended in 1920³⁶ and again in 1971.³⁷ Once Congress pre-empted the field, all state maritime lien statutes were immediately invalidated to the extent that they related to necessities of types covered by the federal legislation. *Piedmont, etc., Coal Co. v. Seaboard Fisheries Co.*, 254 U.S. 1, 11 (1920); *Dampsk. Dannebrog v. Signal Oil & Gas Co.*, 310 U.S. 268 (1940).

In an apparent contradiction of their concession that "....Congress alone may regulate maritime commerce" (Brief, p. 22, and see p. 54), Appellants argue that "....states already have authority to legislate in the admiralty jurisdiction" (Brief, p. 76), citing *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960) and *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955). *Wilburn* involved a claimed conflict between a state statute and the general maritime law, and will be discussed together with other decisions on that subject, *infra*, p. 30.

The clash alleged in *Huron* was between local legislation (there a city ordinance) and federal legislation. The ordinance provided penalties of \$100 and up to 30 days in jail for the emission of more than a specified amount of smoke. Its application to vessels calling at Detroit was attacked, not on the basis of a conflict with the Admiralty Clause, which was apparently not briefed or argued, but solely on the ground that it was an undue burden on inter-

³⁵ 36 STAT. 604.

³⁶ 41 STAT. 1005-06; see 46 U.S.C. §§ 971-75.

³⁷ 1971 U. S. CONG. & AD. NEWS, Vol. 1, p. 291.

state and international commerce. It was contended that the vessel concerned had been constructed and maintained in conformity with federal laws, but that it was nevertheless impossible to perform necessary boiler cleaning without the emission of smoke in excess of the maximum quantity permitted by the ordinance. A divided Court held that application of the ordinance to a vessel owner was not a violation of the Commerce Clause. Mr. Justice Stewart, writing for the majority, stated, at 362 U.S. 442, note 1:

“***[W]e do not reach the question of the validity of the inspection sections as they might be applied to the [vessel owner], but limit our consideration solely to what is presented upon this record—the enforcement of the criminal provisions of the Code for violation of the smoke emission provisions.”

The majority further noted that the sole aim of the ordinance was “*** the elimination of air pollution to protect the health and enhance the cleanliness of the local community”, whereas the purpose of the federal statutes and regulations relating to boilers and propulsion and auxiliary machinery of sea-going vessels was “*** to insure the sea-going safety of vessels subject to inspection”. 362 U.S., at p. 445. The Court concluded that the federal inspection laws and the ordinance did not “overlap”, and that the federal laws therefore did not pre-empt the field. 362 U.S., at p. 446. The Court then stated at p. 447:

“The scope of the privilege granted by the federal licensing scheme has been well delineated. A state may not exclude from its waters a ship operating under a federal license. *Gibbons v. Ogden*, 9 Wheat. 1. A state may not require a local occupation license, in addition to that federally granted, as a condition precedent to the use of its waters. *Moran v. New Orleans*, 112 U.S. 69. While an enrolled and licensed vessel may be required to share the costs of benefits it enjoys, *Huse v. Glover*, 119 U.S. 543, and to pay fair taxes imposed by its domi-

cile, *Transportation Co. v. Wheeling*, 99 U.S. 273, it cannot be subjected to local license imposts exacted for the use of a navigable waterway, *Harman v. Chicago*, 147 U.S. 396. See also *Sinnot v. Davenport*, 22 How. 227".

Mr. Justice Douglas wrote a strong dissenting opinion, in which Mr. Justice Frankfurter concurred. He said, at pp. 454-55:

"What we do today is in disregard of the doctrine long accepted and succinctly stated in the 1851 Term in *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. 518, 566, 'No State law can hinder or obstruct the free use of a license granted under an act of Congress.' The confusion and burden arising from the imposition by one State of requirements for equipment which the Federal Government has approved was emphasized in *Kelly v. Washington*, 302 U.S. 1 * * *, *supra*, in the passage already quoted. The requirements of Detroit may be too lax for another port. Cf. *People v. Cunard White Star, Ltd.*, 280 N.Y. 413. The variety of requirements for equipment which the States may provide in order to meet their air pollution needs underlines the importance of letting the Coast Guard license serve as authority for the vessel to use, in all our ports, the equipment which it certifies."

As will be shown in Point II, *infra*, pp. 33-52, the Florida Act would impose on vessels engaged in interstate and international commerce burdens even more onerous than those which the majority in *Huron* agreed the states were powerless to impose. The Act would therefore not only clash with the Admiralty Clause, but insofar as it would relate to interstate and international commerce, it would, under the reasoning of both the majority and the minority in *Huron*, be violative of the Commerce Clause as well.

C. State statutes may not contravene the general maritime law, or interfere with its proper harmony and uniformity.

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) is inapplicable to maritime causes of action. Under the doctrine of *The Lottawanna*, 88 U.S. 558 (1875) *supra*, p. 17, there is a general maritime law, which is federal, and which is applicable uniformly throughout the United States, and any state statute which is contrary to that law is invalid, just as it would be if it contravened a federal statute in the maritime field. *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); *Washington v. W. C. Dawson & Co.*, 264 U.S. 219 (1924); see *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955).

The landmark *Jensen* case held that the New York State Workmen's Compensation Statute³⁸ could not validly be applied to the death of a longshoreman resulting from an accident on board a vessel afloat in the navigable waters of the State. In referring to state statutes in the maritime field, this Court said, at 244 U.S. 216:

" . . . [P]lainly, we think no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself."

Noting that the work of a longshoreman in loading a vessel is maritime in nature, and that the rights and lia-

³⁸ C. 816, Laws 1913; re-enacted and amended C. 41, Laws 1914; amended C. 316, Laws 1914.

bilities arising from injuries sustained while engaged in such work are matters clearly within the admiralty and maritime jurisdiction of the United States, the Court continued, at pp. 217-18:

"If New York can subject foreign ships coming into her ports to such obligations as those imposed by her Compensation Statute, other states may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded * * *. The legislature exceeded its authority in attempting to extend the statute under consideration to conditions like those here disclosed. So applied, it conflicts with the Constitution and to that extent is invalid."

The Court then stated that the remedy which the New York State Workmen's Compensation Statute purported to give was of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court, and therefore not "saved to suitors" from the otherwise exclusive grant of admiralty jurisdiction to the federal district courts made by Section 9 of the Judiciary Act of 1789.³⁹

Evidently acting in the belief that *Jensen* was based primarily on the Court's observation that workmen's compensation was not a common law remedy saved to suitors under the Judiciary Act, Congress promptly amended that statute so as to save to suitors, not only their common law remedies, but also any "rights and remedies under the Workmen's Compensation Law of any State."⁴⁰ This amendment was, however, struck down

³⁹ 1 STAT. 76-77.

⁴⁰ 40 STAT. 395.

by this Court in *Knickerbocker*, *supra*, wherein, after referring to its earlier decisions, including *Jensen*, the Court stated, at 253 U.S. 169-171:

"The Constitution is as part of the laws of itself adopted and established, rules of the general in the United States, approved Congress to legislate maritime law and empowered matters within the adm respect of them and other tion. Moreover, it tooiralty and maritime jurisdiction by legislation or judk from the States all power, the essential purposesocial decision, to contravene jury to, characteristic of, or to work material in-interfere with its pro features of such law or to in its international aber harmony and uniformity preserve adequate ha and interstate relations. To form rules relating to mony and appropriate uni-them within control of maritime matters and bring the fundamental purpo the Federal Government was Congress was empowe the Federal Government was sphere * * *. The fiere; and to such definite end the Constitution itself red to legislate within that rights and liabilities old was not left unoccupied; tainly these are not lesadopted the rules concerning have been if enacted applicable therein; and cer-s paramount than they would

Appellants are critical of Congress."

this Court on the subject of f time field. In particular, the certain of the decisions of *Knickerbocker, supra*, described federal supremacy in the mari-pronouncements" which "coy find fault with *Jensen* and in such fashion as to ignore ed by Appellants as "judicial (Brief, p. 49). They contend nstrue the Admiralty Clause autonomous sovereignty withstate sovereignty altogether" to the Court's "continuingthat these cases "establish an scope" to the Admiralty Clain the admiralty," and refer 49-50). AIMS and the P. & endowment of power and pletely with these categoriz use as a "legend" (Brief, pp. the principle reiterated in J. I. Associations disagree com-ations. They maintain that *Jensen* is eminently sound and

is just as valid today as it was in 1917. While one may disagree with the finding in *Jensen* that the application of a state workmen's compensation statute to personal injury to, or death of a longshoreman working on a vessel within the territorial waters of the state is not a matter of "local concern", there should be no disagreement with the *Jensen* principle that, except in matters of purely local concern, state legislation may neither contravene an applicable federal statute nor affect the general maritime law. In any event, as the court below stated (A44):

"The Florida Act here constitutes a far greater intrusion into the federal maritime domain than the New York statute in the *Jensen* case. If applied to the plaintiffs and intervenors in this case, the Florida Act would effect—in the words of *Jensen*—the 'destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded'."

The following are examples of the many decisions, in addition to those already cited, holding state and local legislation invalid as in conflict with the general maritime law:

Gibbons v. Ogden, 22 U.S. 1 (1824), invalidating a state statute purporting to give Robert Fulton and another the exclusive right to operate steamboats on the Hudson River;

Workman v. City of New York, 179 U.S. 552 (1900), holding that a municipal ordinance may not limit a right of recovery existing under the general maritime law;

Branch v. Schumann, 445 F.2d 175 (5th Cir. 1971), wherein the court struck down a Florida statute⁴¹ purporting to change the basis of liability for a maritime tort.

⁴¹ FLORIDA STATUTES § 371.52 (1970).

The same principle applies to non-statutory rules of law adopted by state courts. There are many examples of judicially fashioned rules of law which have been invalidated as in conflict with rules of the general maritime law. To name but a few:

Chelentis v. Luckenbach Steamship Co., 247 U.S. 372 (1918), holding that prior to passage of the Jones Act,⁴² the general maritime law, and not state law, must be applied in actions for seamen's injuries, even if brought in state courts;

Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942), wherein this Court refused to permit application of Pennsylvania law, which placed the burden of proving the invalidity of a release on the releasor, in a Pennsylvania state court action for a seaman's injuries, and instead applied the general maritime law, whereunder one asserting a seaman's release as a defense has the burden of proving its validity;

Kossick v. United Fruit Co., 365 U.S. 731 (1961), holding a state statute of frauds inapplicable to a maritime contract—here an oral guaranty allegedly given to a seaman by his employer;

Kermarec v. Compagnie Generale, 358 U.S. 625 (1959), applying the general maritime law, rather than the law of New York, to an injury sustained by a visitor on board a vessel in New York harbor;

Pope & Talbot, Inc. v. Hawk, 346 U.S. 406 (1953), holding that the general maritime law rule, whereunder contributory negligence does not bar a recovery but is only considered in mitigation of damages, must be applied in suits for maritime injuries, regardless of the forum;

⁴² 46 U.S.C. § 688.

Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970), overruling *The Harrisburg*, 119 U.S. 199 (1886), and holding that apart from any state wrongful death statute, the general maritime law affords a cause of action for wrongful death;

Benazet v. Atlantic Coastline R.R. Co., 442 F.2d 694 (2d Cir. 1971), *aff'd per curiam*, 40 U.S.L.W. 4516 (U.S. May 15, 1972), holding that a state law may not validly be invoked to provide contribution between joint tortfeasors in maritime cases, in contravention of the general maritime law, which recognizes no such right, except in collision cases. (See *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp.*, 342 U.S. 282 [1952]).

See, also, D. Currie, "Federalism and the Admiralty: 'The Devil's own Mess'", 1960 Sup. Ct. Rev. 158, 188, 195-96.

Even when the area is one covered neither by federal legislation nor by a previously announced rule of the general maritime law, state law will not be applied, if the area is one wherein national uniformity and harmony are desirable. Instead, this Court will fashion a rule, which is part of the general maritime law, will thereupon become part of the United States. See *Kermarec v. Campbell*, 359 U.S. 237, 1959, 1960, *supra*, p. 29; *Southern Pacific Co. v. Jensen*, *supra*, p. 25.

Fireman's Fund Ins. Co., 348 U.S. 310 (1955), cited by appellants (Brief, p. 76) in support of their submission that "states already have authority to legislate in the admiralty jurisdiction", a divided Court⁴³ held a state policy on a small houseboat em-
 ranties applicable to a

⁴³ Chief Justice Warren and Justices Clark, Douglas and Minton joined with Mr. Justice Black in the majority opinion; Mr. Justice Frankfurter concurred in the result, and Justices Reed and Burton dissented. At the time, the Court consisted of eight justices.

played on the waters of Lake Texoma, an artificial lake lying between Texas and Oklahoma. Mr. Justice Black, writing for the majority, said that the crucial questions presented were narrowed to two: (1) whether there was a judicially established federal maritime rule governing marine insurance warranties, and (2) if not, whether the Court should fashion one. He then found that there was no such judicially established rule and that there was no need for the Court to fashion one, because in his view the regulation of marine insurance policies should be left with the states.

Mr. Justice Reed, in a vigorous dissent, noted that there was a body of lower federal court decisions following the English rule of strict compliance with marine insurance warranties. He said he was " * * * inclined to think that Congress or this Court might well consider modifying the strict rule insofar as the breached warranty does not contribute to the loss." However, since the majority had concluded that the Court should not undertake the task, he found it unnecessary to do more than say that in the absence of federal amelioration he "would follow the established rule of holding the insured to his warranty." 348 U.S., at 326-27.

Wilburn has been much criticized and seldom followed, and its validity today is open to question.⁴⁴ Its true significance can, it is submitted, best be gathered from Mr. Justice Frankfurter's concurring opinion. He said that the "question, and the only question * * * to be decided [was] whether the demands of uniformity relevant to maritime law require that marine insurance on a houseboat yacht brought to Lake Texoma for private recreation should be subject to the same rules of law as marine insurance on a houseboat yacht 'confined', after arrival, to the waters of Lake Tahoe or Lake Champlain." In his

⁴⁴ See, e.g., D. Currie, *Federalism and the Admiralty: "The Devil's own Mess"*, 1960 SUPREME CT. REV. 158, 210, 215-220.

view, the answer to this question was that "the interests concerned with shipping in its national and international aspects are substantially unconcerned with the rules of law to be applied to such limited situations", and he joined "in a result restricted within this compass." 348 U.S., at p. 322.

Mr. Justice Frankfurter then stated, at p. 323:

"Unfortunately, for reasons that I do not appreciate, the Court's opinion goes beyond the needs of the problem before it. Unless I wholly misconceive that opinion, its language would be invoked when cases so decisively different in degree as to be different in kind come before this Court. It seems directed with equal force to ocean-going vessels in international maritime trade, as well as coastal, intercoastal and river commerce. Is it to be assumed that were the Queen Mary, on a world pleasure cruise, to touch at New York City, New Orleans and Galveston, a Lloyds policy covering the voyage would be subjected to the varying insurance laws of New York, Louisiana and Texas? . . . It cannot be that by this decision the Court means suddenly to jettison the whole past of the admiralty provision of Article III and to renounce requirements for nationwide maritime uniformity, except insofar as Congress has specifically enacted them, in the field of marine insurance.

It is appropriate to recall that the preponderant body of maritime law comes from this Court and not from Congress. Judicial enforcement of nationwide rules regarding marine insurance is, as my brother REED cogently shows, deeply rooted in history. What reason is there for abruptly turning over, pending action by Congress, to the crazy-quilt regulation of the different States what so long has been the business of the courts?"

It is submitted that the only possible way in which the majority opinion in *Wilburn* can be reconciled with the long line of decisions of this Court, commencing with *The*

Lottawanna, 88 U.S. 558 (1875) and continuing through *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970) is that suggested in Mr. Justice Frankfurter's concurring opinion, i.e., that insurance on a small houseboat restricted to an artificial lake located between two states might be treated as falling within the "local concern" exception to the rule that in the absence of Congressional legislation state legislatures are powerless to act in the maritime area.

The sweeping provisions of the Florida Act would apply alike to the largest foreign flag tanker calling at Tampa and the smallest domestic oil barge employed on a Florida inland waterway. They could certainly not be considered in the same category as the Texas statute on insurance warranties applied to the Lake Texoma houseboat in *Wilburn*.

POINT II

The Florida Act contravenes essential purposes expressed by acts of Congress and international conventions; it is contrary to the general maritime law and interferes with its proper harmony and uniformity.

A. The Florida Act conflicts with federal legislation and international conventions.

1. Federal water pollution legislation.

Congress has been providing by statute for the prevention and minimization of water pollution since 1886. The federal statutes in this area, which supplement and to some extent alter the general maritime law, include, in chronological order:

1. The New York Harbor Act of 1886;⁴⁵

⁴⁵ 24 STAT. 329.

2. The Obstruction Act of 1890;⁴⁶
3. The Refuse Act of 1899;⁴⁷
4. The Oil Pollution Act of 1924⁴⁸ (superseded by the Water Quality Improvement Act of 1970);
5. The Water Pollution Control Compact Act;⁴⁹
6. The Federal Water Pollution Control Act;⁵⁰
7. The Act to Implement the Provisions of the International Convention for the Prevention of the Pollution of the Sea by Oil;⁵¹
8. The Clean Waters Restoration Act of 1966⁵² (superseded by the Water Quality Improvement Act of 1970);
9. The Water Quality Improvement Act of 1970⁵³ (hereinafter "W.Q.I.A.").
10. The Ports and Waterways Safety and Environmental Quality Act of 1972.⁵⁴

The New York Harbor Act, *supra*, is still in effect, and prohibits the discharge of matter of any kind, other than that flowing from streets and sewers, into the waters of the harbors of New York, Hampton Roads and Baltimore.

The policy implicit in the New York Harbor Act was given national application in the Refuse Act of 1899, *supra*,

⁴⁶ 26 STAT. 453, as amended 28 STAT. 363.

⁴⁷ 33 U.S.C. § 407.

⁴⁸ 33 U.S.C. §§ 431-37 (1964).

⁴⁹ 61 STAT. 682.

⁵⁰ 33 U.S.C. §§ 1151-60.

⁵¹ 33 U.S.C. §§ 1001-15.

⁵² 80 STAT. 1252.

⁵³ 33 U.S.C. §§ 1161-75.

⁵⁴ Pub. L. No. 92-340 (July 10, 1972).

which is still in effect and which is now proving to be a most successful vehicle for the Federal Government's efforts to clean up the nation's waters.⁵⁵ Although it was passed well before petroleum and its derivatives became cargoes routinely carried by sea in bulk, and therefore omits mention of them, this Court has held that the statute may properly be invoked to punish the discharge of petroleum products. *United States v. Standard Oil Co.*, 384 U.S. 224 (1966). See also, *La Merced*, 84 F. 2d 444 (9th Cir. 1936) and *United States v. Esso Standard Oil Co.*, 375 F. 2d 621 (3rd Cir. 1967). Other materials the discharge of which has been held to fall within the ban of the 1899 Act include dunnage, *United States v. The Helen*, 164 F. 2d 111 (2d Cir. 1947); garbage, *The Mormacsaga*, 204 F. Supp. 701 (E.D. Pa. 1962); sourmash, *Maier v. Publicker Commercial Alcohol Co.*, 62 F. Supp. 161 (E.D. Pa. 1945), *aff'd per curiam*, 154 F. 2d 1020 (3d Cir. 1946); and see *United States v. Florida Power and Light Company*, 311 F. Supp. 1391 (S.D. Fla. 1970), relating to thermal pollution by heated water.

Water pollution by discharges of oil was first made the specific subject of legislation in the Oil Pollution Act of 1924, *supra*, which made it unlawful to discharge oil into the navigable waters of the United States, "except in case of emergency imperiling life or property or unavoidable accident, collision, or stranding ***."⁵⁶ The Clean Waters Restoration Act of 1966, *supra*, amended the 1924 Act, but did not affect the 1899 Act. Among other things it made the shipowner responsible for removal—or the payment of the Government's removal costs—but only if the

⁵⁵ S. Kashiwa, *The Refuse Act and Protection of Water Quality*, 9 HOUST. L. REV. 676 (1972). The author is Assistant Attorney General, Land and Natural Resources Division, Department of Justice.

⁵⁶ 33 U.S.C. § 433 (1964).

discharge of oil from his vessel was caused wilfully or by gross negligence.

The 1924 Act, as amended in 1966, was supplanted in 1970 by W.Q.I.A., which contains detailed provisions for the control of pollution by oil, whether discharged from vessels or from on shore or off shore installations, for liability for cleanup costs, and for promulgation of regulations by the President concerning abatement of pollution by other "hazardous polluting substances".⁵⁷

W.Q.I.A. declares that

" . . . [I]t is the policy of the United States that there should be no discharges of oil into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone."⁵⁸

The Florida Act, which came into force after the effective date of W.Q.I.A., would, if held valid, contravene some and duplicate other provisions of that statute (see the comparative table annexed hereto as Table A illustrating the principal provisions of the Florida Act which contravene or duplicate those of federal statutes, international conventions, and rules of the general maritime law). For example, if the vessel owner or operator fails to clean up an oil discharge, W.Q.I.A. requires the Federal Government to do so, and the Government may then recover the costs, unless the owner or operator proves that the discharge was the result of an act of God, an act of war, the Government's negligence, or the act or omission of a third party. Liability is limited to a sum equal to \$100 multiplied by the vessel's gross tonnage, or \$14 million, whichever is the lesser, unless the discharge was caused by a willful

⁵⁷ 33 U.S.C. § 1162(a).

⁵⁸ 33 U.S.C. § 1161(b)(1).

act or willful negligence of the owner or operator, in which case the liability is unlimited.⁵⁹

The Florida Act, on the other hand, would appear to contemplate cleanup operations by the State if the vessel owner or operator failed to undertake them, and the owner or operator would then be absolutely liable, without limitation.⁶⁰

Bills amending W.Q.I.A. in numerous respects, including the extension of its liability provisions to other "hazardous polluting substances" besides oil, have been passed by both Houses of Congress and referred to a House-Senate Conference for the purpose of reconciling differences. See Brief *Amicus* of The Maritime Law Association of the United States, in support of affirmance, note 16, p. 8. Meanwhile, on July 10, 1972 the President approved the Ports and Waterways Safety and Environmental Quality Act,⁶¹ one purpose whereof is the protection of navigable waters from environmental harm. It contains elaborate provisions with respect to the construction, alteration and repair of vessels carrying oil and other "hazardous polluting substances", and with respect to the movement of vessels in areas determined to be hazardous under conditions such as reduced visibility, adverse weather, or congestion. As shown in Table A, the Florida Act squarely conflicts with these provisions.

The Florida Act requires consideration in relation not only to the substantial body of federal legislation concerning water pollution, but also to four international conventions in the same area. The first is the International Convention for the Prevention of Pollution of the Sea by Oil,⁶² ratified by the United States in 1961 and implemented

⁵⁹ 33 U.S.C. § 1161(f)(1).

⁶⁰ FLORIDA STATUTES §§ 376.11, 376.12 (1970).

⁶¹ Pub. L. No. 92-340 (1972).

⁶² TIAS 4900, 12 UST 2989, 327 UNTS 3.

by the Oil Pollution Act of that year.⁶³ Amendments adopted in 1962 were ratified by the United States,⁶⁴ and the 1961 Oil Pollution Act was correspondingly amended in 1966.⁶⁵ Further amendments to the Convention, made on the recommendation of the Intergovernmental Maritime Consultative Organization (hereinafter "IMCO"), an affiliate of the United Nations, were ratified by the Senate on September 20, 1971, on the recommendation of the President.⁶⁶ When the new amendments come into force, they will completely prohibit the voluntary discharge of oil or oily mixtures from vessels, save in relatively minute quantities and under tightly controlled conditions.⁶⁷

The second is the "Intervention Convention," signed November 29, 1969, and ratified by the Senate September 20, 1971.⁶⁸ When it enters into force, this Convention will confirm the right of the signatories to take such reasonable steps as they may deem necessary to minimize pollution damage to their coasts and coastal waters, following a casualty.

At the same time (November 29, 1969) the third Convention—on Civil Liability for Oil Pollution⁶⁹—was signed. When it becomes effective, it will regulate liability to governments for cleanup costs and liability to both governments and private interests for damages resulting from discharges of oil cargoes. Ratification of this Con-

⁶³ 75 STAT. 402.

⁶⁴ February 25, 1964.

⁶⁵ 80 STAT. 372.

⁶⁶ 117 CONG. REC. S14606-8 (daily ed. Sept. 20, 1971).

⁶⁷ New Article III, as found in IMCO Resolution A.175(VI), adopted 21 October 1969 (*Amendments to the International Convention for the Prevention of Pollution of the Sea by Oil, 1954*), at Executive G, 91st Cong., 2nd Sess. pp. 30-31.

⁶⁸ 117 CONG. REC. S14606-8 (daily ed. Sept. 20, 1971) *see note 5 supra*.

⁶⁹ Executive G, 91st Cong., 2nd Sess.

vention was also requested by the President,⁷⁰ but the Senate Foreign Relations Committee recommended that it be held in abeyance, pending formulation of the fourth, the so-called "Fund" Convention, then under consideration by IMCO.⁷¹ That Convention⁷² was signed December 18, 1971, and the President recommended ratification May 5, 1972.⁷³ Under these circumstances, it does not appear unreasonable to assume that both the Civil Liability Convention and the "Fund" Convention will soon be ratified.

The Civil Liability Convention will make the vessel owner liable for pollution damages (including the cost of preventive measures) resulting from a discharge of oil, unless he can prove that the discharge was a result of hostilities, "a natural phenomenon of an exceptional, inevitable and irresistible character",⁷⁴ governmental negligence in the maintenance of navigational aids, or acts or omissions of third parties "with intent to cause damage".⁷⁵ If the discharge is not the result of the owner's "actual fault or privity" he will be entitled to limit the amount of his liability to 2,000 "Poincaré" gold francs⁷⁶ (about \$146 at the new rate) per ton of the vessel's adjusted net tonnage, subject to a ceiling of 210 million gold francs (about

⁷⁰ *Id.*, p. (1).

⁷¹ Senate Foreign Relations Committee, *Executive Report No. 92-9, "1969 Oil Pollution Conventions and Amendments"*, August 5, 1971, 92nd Cong., 1st Sess.

⁷² International Convention on the Establishment of an International Fund For Compensation For Oil Pollution Damage, Executive K, 92nd Cong., 2nd Sess.

⁷³ *Id.*, pp. (III), (IV).

⁷⁴ It is understood that this phraseology was insisted upon by the U.S.S.R. delegation instead of the more traditional "act of God".

⁷⁵ 1969 Civil Liability Convention, Article III, § 2.

⁷⁶ 1969 Civil Liability Convention, Article V, § 1. The "Poincaré" franc is a unit of 65.5 milligrams of gold of millesimal fineness 900. *Id.*, V(9).

\$15.4 million).⁷⁷ The Convention will require insurance or other satisfactory evidence of financial responsibility to meet the liabilities it will impose.⁷⁸

The "Fund" Convention is designed to set up an international fund, financed by contributions from receivers of substantial quantities of oil, to meet claims for pollution damages to the extent that they are not recoverable under the Civil Liability Convention. The maximum amount recoverable, including amounts paid under the Civil Liability Convention, would be approximately \$32.5 million per incident.⁷⁹

2. *Federal Legislation and International Agreements Concerning Construction and Inspection of Vessels and Licensing of Personnel.*

Congress has established a comprehensive regulatory system, administered by the United States Coast Guard, governing the construction and inspection of powered vessels employed on navigable waters of the United States.⁸⁰ The federal legislation is in consonance with the International Convention for the Safety of Life at Sea,⁸¹ commonly known as "SOLAS", which has been ratified or adhered to by all maritime nations, including the United States.

⁷⁷ *Id.*, V, § 1.

⁷⁸ 1969 Civil Liability Convention, Article VII. The Convention is analyzed in Healy, *The International Convention on Civil Liability For Oil Pollution Damage*, 1969, 1 J. MAR. L. & COMM. 317 (1970). For a comparison of W.Q.I.A. with the 1969 Civil Liability Convention, see Healy and Paulsen, *Marine Oil Pollution and the Water Quality Improvement Act of 1970*, 1 J. MAR. L. & COMM. 537 (1970).

⁷⁹ 1971 Convention on an International Fund For Compensation of Oil Pollution Damage, Article 4, § 4(a). This amount may be doubled by subsequent agreement of the Contracting States. Article 4, § 6.

⁸⁰ 46 U.S.C. §§ 361-436; 46 C.F.R. §§ 1-199.

⁸¹ TIAS 5780, 16 UST 185, 536 UNTS 27 (1965).

1, would require vessels trans-

The Florida Act, if valid, maintain on board containment porting "pollutants" to ma's Department of Natural Re- gear approved by the State'ed in the use of such gear"; sources, "with a crew traineinted port manager "to board would authorize a State-appointo port in order to ascertain any vessel prior to its entry ind the presence of required [its] seaworthiness * * * and empower state officials to containment gear," and wou minimum weather and sea establish "requirements for vessel to enter port and for conditions for permitting a f vessels * * *." ⁸² The Act the safety and operations of ls and employees powers al- would thus give state officials to the Coast Guard under ready delegated by Congress to vessel construction and the federal legislation relative Florida legislation became inspection in force when the 37, above, it is also in con- effective. As shown at p. 3 Ports and Waterways Safety flict with the provisions of the nstruction, repair and inspec- Act of 1972 ⁸³ relating to con authority to direct the move- tion, and to the Coast Guard's areas. ment of vessels in hazardous

It is not only unconstitutional but totally impractical for Florida—or any other State—to set up its own vessel equipment and inspection requirements for vessels trading to the State, in addition to the elaborate system devised by the United States Government in cooperation with other maritime nations. If the people of Florida think that the existing federal legislation in this field requires change in any respect they are of course free to press for such change through their representatives and senators in Washington; any such dissatisfaction should not take the form of ill-conceived, if well-intentioned, state legislation.

It is also manifestly improper and impractical for a state employee—whether or not properly qualified—to sub-

⁸² FLORIDA STATUTES § 376.7(2)(a), (c) and (g) (1970).

⁸³ Pub. L. No. 92-340.

stitute his judgment concerning the effect of weather and sea conditions on a particular vessel for that of a master duly licensed by the United States or other national government, or of a properly authorized Coast Guard officer. Nor is it proper for state employees to determine whether the crew of a vessel calling at one of its ports is adequate in number or properly trained in the use of the vessel's equipment. In the case of United States flag vessels, such problems must be dealt with by the Coast Guard, which has charge of licensing and manning requirements.⁸⁴

As to foreign flag vessels, the Convention Concerning the Minimum Requirement of Professional Capacity for Masters and Officers on Board Merchant Ships,⁸⁵ adopted at the 1936 International Labor Conference and ratified by the United States, would, by implication at least, require recognition of valid licenses held by masters and officers of vessels of signatory nations calling at United States ports. The Florida Act, insofar as it would empower state employees to pass upon the qualifications of masters and officers, would therefore be in conflict with this Convention, as well as with federal manning legislation.

3. *The United States Limited Liability Act.*

Under the Limited Liability Act,⁸⁶ where there are no death or injury claims, the liability of a vessel owner or demise charterer for property damage is limited to the value of the vessel at the end of the voyage, plus the "freight then pending", if he can show that the damage was not caused with his "privity or knowledge".

Appellants are in error in asserting (Brief, p. 65) that there is a conflict between the Limited Liability Act and

⁸⁴ 46 U.S.C. §§ 221-49c; 46 C.F.R. §§ 10.01-10.15.

⁸⁵ USTS, No. 950; 6A BENEDICT ON ADMIRALTY 989 (7th ed. rev., by Knauth).

⁸⁶ 46 U.S.C. §§ 183-89.

W.Q.I.A. As indicated above, at pp. 36-37, that statute changed the law of limitation in respect of United States Government claims for the cost of cleaning up an oil spill, by requiring a separate "limitation fund" of \$100 per gross ton of the vessel's tonnage (with a ceiling of \$14 million), to be available exclusively for payment of such claims.⁸⁷

What Congress could do, however, the states are powerless to do; no state statute is valid if it contravenes the Limited Liability Act. *Butler v. Boston & Savannah Steamship Co.*, 130 U.S. 527 (1889); *Flink v. Paladini*, 279 U.S. 59 (1929); *Loughlin v. McCaulley*, 186 Pa. St. 517, 40 Atl. 1020 (S.Ct. Pa. 1898).

Appellants concede that the Limited Liability Act "cannot co-exist in the same courtroom with the Florida Act" (Brief, p. 64), and that it would, "assuming continued vitality of *Richardson v. Harmon* [222 U.S. 96 (1911)] and 46 U.S.C. § 189, clash head-on with absolute and unlimited liability aspects of the Florida Act." (Brief, p. 65).⁸⁸ They therefore urge that *Richardson* be overruled, and that the Limited Liability Act be declared unconstitutional on "due process" grounds, insofar as it applies to claims of parties not in contractual relationship with the shipowner (Brief, pp. 65-69).

Long before adoption of the Admiralty Extension Act⁸⁹ *Richardson* had held the Limited Liability Act, as amended by the addition of 46 U.S.C. § 189 (Appellants' Brief, p. 3), properly applicable to damage caused by vessels to shore-

⁸⁷ 33 U.S.C. § 1161(f)(1).

⁸⁸ cf. Brief Amicus of Commonwealth of Massachusetts, at p. 10: "Massachusetts does not challenge the Limitation of Liability Act (46 U.S.C. §§ 181-189) and concedes that a shipowner sued *in personam* for oil pollution damages could limit his liability under that Act."

⁸⁹ 46 U.S.C. § 740.

since been applied on innumerable other third party tort claims of side property. It occasions to collisions every conceivable at the Limited Liability Act has no

It should be no on the shipowners' own fault, but effect on claims bely on fault of the master or crew only on those base aside employees. Even as to such or non-managerial except in the more unusual cases claims it has no ehan the "limitation fund". While where they total mer's limitation of liability in prop the basis of the shivalue of the vessel and the voyage erty damage casesle, the concept of limitation is by earnings—may be shipping. The business corpora no means restrictionization, and ceilings on recoveries tion, bankruptcy, reall forms of limitation of liability. for wrongful death

rt has never held a federal statute Apparently thision unconstitutional on "due proc of nation-wide appy event the constitutionality of the ess" grounds.⁹⁰ Inhas been settled since *Butler* and Limited Liability flows that since the two pieces of *Richardson*, and it cannot coexist, it is the Florida Act, legislation admittedtute, which must fall. and not the federal

Statute.

4. The Federal Wr

The Federal Wr Statute, which is part of the Rivers and Harbors Act,⁹¹ makes it unlawful to permit or cause untarilly or carelessly, in navigable vessels to be sunk, is so wrecked and sunk, the owner channels. If a vess ediatey undertake its removal. Fail must mark it and im

⁹⁰ "In fact, it does t appear that the Court has up to this time ever held an act Congress unconstitutional on this ground [the Due Process clause f the Fifth Amendment]" CONSTITUTION OF THE U.S.A. ANNOTED, S. Doc. No. 39, p. 973, 88th Cong., 1st Sess. (N. Small ed., 1964).

⁹¹ 33 U.S.C. §§ 409-

ure to do so is considered an abandonment, subjecting the wreck to removal by the United States.

The Florida Act would make it unlawful to leave a vessel in a wrecked, junked or substantially dismantled condition or abandoned on the waters of the State, without the consent of the State's Department of Natural Resources, and would empower the Department to remove any derelict vessel if it obstructed or threatened to obstruct navigation, to contribute to water pollution, or otherwise to endanger the environment.⁹² While it is stated that this provision "is not intended to be in contravention of any applicable federal act" it is in fact in contravention of the Federal Wreck Statute, *supra*, which gives the owner the option to either remove the wreck or abandon it to the United States, subject to the rule of *Wyandotte Transportation Co. v. United States*, 389 U.S. 191 (1967), whereunder the owner may be held liable for removal costs if the vessel was wrecked as a result of his fault. The Florida Act is thus plainly in contravention of the Federal Wreck Statute. *The Central States*, 9 F. Supp. 934 (E.D.N.Y. 1935); *Petition of Highlands Nav. Corp. (The Grand Republic—The Nassau)*, 29 F.2d 37 (2d Cir. 1928); *City of Newark v. Mills (The South Shore)*, 35 F.2d 110 (3d Cir. 1929).

5. *The Admiralty Grant of the Judicial Code.*

The Florida Act would make a shipowner absolutely liable to the State for the cost of cleaning up a discharge of oil or other "pollutant", regardless of the cause. If the owner claimed that the discharge was caused by an act of God, war, government or a third party, he could then ask for a hearing before the State's Department of Natural Resources. If the Department found the owner's contention correct, it could then, in its discretion, waive reimbursement, but "The findings of the department

⁹² FLORIDA STATUTES § 376.15 (1970).

[would] be conclusive as it is the legislative intent that waiver provided in this act is a privilege conferred, not a right granted.”⁹³

This provision is squarely in conflict with the statutory implementation of the Admiralty Clause, now found in § 1333 of 28 U.S.C., the Judicial Code, granting to the federal district courts exclusive original jurisdiction of “Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled”. The party seeking relief in a maritime case always has the right to invoke the admiralty jurisdiction of a federal district court, and no statute purporting to give exclusive jurisdiction to another tribunal is valid. Here, the party seeking relief would be the shipowner determined to be liable for the discharge. If the Florida Act were otherwise constitutional (and it is not), the provision purporting to vest in a department of the State exclusive jurisdiction to hear and decide the issue whether or not a discharge was the result of one of the four causes named would be invalid. See *Panama R. R. Co. v. Johnson*, 264 U.S. 375 (1924); Gilmore & Black, *The Law of Admiralty* (1957), p. 286.

B. The Florida Act is contrary to and interferes with the proper harmony and uniformity of the general maritime law.

The rules of the general maritime law are of course inapplicable to waters wholly within the State of Florida and having no navigable outlet to the sea or to any other state; no land-locked lake without such a navigable outlet is within the admiralty jurisdiction. All other waters of the State of Florida are, however, within that jurisdiction, and liability for pollution of such waters is therefore governed by the general maritime law, as modified by federal

⁹³ FLORIDA STATUTES § 376.11(6)(c) (1970).

legislation. The Florida Act purports to legislate with respect to *all* waters of the State, including those within the admiralty jurisdiction.

Fault is the basis of maritime tort liability for property claims. *The Clara*, 102 U.S. 200 (1880); *The Jumna*, 149 Fed. 171 (2d Cir. 1906). This principle is of course applicable to the maritime tort of marine pollution damage. *Fireman's Fund Ins. Co. v. Standard Oil Co.*, 339 F.2d 148 (9th Cir. 1964); *In re New Jersey Barging Corp.*, 168 F. Supp. 925 (S.D.N.Y. 1958); *State of California v. The Bourne-mouth*, 307 F. Supp. 922 (C.D. Cal. 1969); and see *Salaky v. Atlas Barge No. 3*, 208 F.2d 174 (2d Cir. 1953); Sweeney, *Oil Pollution of the Oceans*, 37 Ford. L. Rev. 155, 168-81 (1968). See also, Table A annexed hereto.

The Florida Act, if valid, would plainly make absolute the shipowner's liability to the State for damages and clean-up costs,⁹⁴ and, on Appellants' interpretation, at least, it would also impose absolute liability for damages sustained by private interests (see Appellants' Brief, pp. 42-44).

These Appellees may consider the absolute (and unlimited) liability features of the Florida Act unduly burdensome, grossly unfair, and utterly impractical. But these are *not* the grounds on which their complaint rests; the objection is that the Act, if valid, would establish a basis of liability to the State, and possibly to private interests, in conflict with the basis of liability under the general maritime law, and the extent of such liability would differ from that specified under the Limited Liability Act.

Even if there were no rule of the general maritime law establishing the basis of liability for damage caused by vessels, including pollution damage, the Florida Act would nevertheless be invalid, as the area is one wherein national uniformity and harmony is essential. It would therefore

⁹⁴ FLORIDA STATUTES § 376.12 (1970).

be necessary for this Court to fashion a uniform rule to apply throughout the United States, rather than for the individual state legislatures to fashion their own rules.

This is *not* a matter of purely local concern. In the case of the TORREY CANYON, the most devastating oil spill on record, the pollution damage was to the territorial waters and coasts of the United Kingdom, France and the Island of Guernsey. It is hoped that no such catastrophic spill will again occur, but such a casualty could result in the pollution of the waters of both Florida and Georgia (or Alabama), and their respective coasts. It would be unthinkable to have one standard of liability for the damage to Florida's waters and coast and another standard for the damage to the waters and coast of Georgia or Alabama.

Appellants rely on *Cooley v. Board of Wardens*, 53 U.S. 299 (1851) (Brief, p. 13) as justification for the "mechanics" of the Florida Act (its financial responsibility provisions, containment gear requirements, and provisions for determination of sea conditions for entry and unloading, and for boarding and inspection). But *Cooley* dealt with an Act of Congress of 1789 which declared that " . . . all pilots in the bays, inlets, rivers, harbors and ports of the United States shall continue to be regulated in conformity with the existing laws of the states, respectively, wherein such pilots may be, or with such laws as the states may hereafter enact for the purpose, until further legislative provision shall be made by Congress." (53 U.S., at 317). This Court found that there was no subsequent Congressional legislation and, accordingly held valid the Pennsylvania pilotage law of 1803 then being challenged. The Court said:

"Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. That this cannot be affirmed of laws

for the regulation of pilots and pilotage is plain. The act of 1789 contains a clear and authoritative declaration by the first Congress, that the nature of this subject is such, that until Congress should find it necessary to exert its power, it should be left to the legislation of the states; that it is local and not national; that it is likely to be the best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the several states should deem applicable to the local peculiarities of the ports within their limits."

The all-inclusive provisions of the Florida Act and the wide effect of "a maritime disaster of *Torrey Canyon* proportions" to which Appellants say the Florida Act is addressed (Brief, p. 33) are a far cry from the "maritime but local" nature of the Pennsylvania pilotage law held valid in *Cooley*.

C. The Florida Act does not fall within the scope of the "Police Power".

Appellants argue (Brief, pp. 41-51) that the Florida Act is a valid exercise of the State's "police power". The term is at best a vague concept. It is quite true that it permits enactment of state legislation of a purely local nature involving maritime matters. For example, in *Kelly v. Washington*, 302 U.S. 1 (1937), it was held that a state may subject domestic tugs primarily engaged in work in and about the harbors where they are stationed to hull and machinery inspections to assure safety and seaworthiness, provided " * * * these tugs respectively do not carry freight or passengers for hire, or do not have on board any inflammable or combustible liquid cargo in bulk, or do not transport explosives or like dangerous cargo, or are not seagoing vessels of three hundred gross tons or over, or, with respect to requirements as to load lines, are under one hundred and fifty gross tons * * *". (302 U.S., at 8). But the Court made it quite clear that even in regard to

this very limited class of vessels, if " * * * the State goes further and attempts to impose particular standards as to structure, design, equipment and operation which in the judgment of its authorities may be desirable but pass beyond what is plainly essential to safety and seaworthiness, the State will encounter the principle that such requirements, if imposed at all, must be through the action of Congress which can establish a uniform rule". (302 U.S., at 15). In any event, *Kelly* is inapposite, in view of the enactment, on July 10, 1972, of the Ports and Waterways Safety and Environmental Quality Act.

In *Huron Portland Cement Company v. City of Detroit*, 362 U.S. 440 (1960), discussed above, at pp. 22-24, this Court held it was a valid exercise of the police power for the City of Detroit to apply the limited penal sanctions of its Smoke Abatement Code to the owner of an offending vessel berthed at Detroit. But in the words of the court in *American Airlines, Inc. v. Town of Hempstead*, 272 F. Supp. 226, 234 (E.D.N.Y. 1967), the *Huron* case "makes plain that the ordinance in question to be valid must be not only rooted in a proper and real local police power interest, but it must also be free of direct regulation of commerce, it must not burden commerce, and it must not operate in a field fully occupied by federal legislation." It can scarcely be said that the Florida Act meets any of these tests.

It is also true that in the absence of Congressional legislation the states have a limited right to regulate fishing in local waters. *Manchester v. Massachusetts*, 139 U.S. 240 (1891); *Lawton v. Steele*, 152 U.S. 133 (1894); *Lee v. New Jersey*, 207 U.S. 67 (1907); *Skiriotes v. Florida*, 313 U.S. 69 (1941); *C. J. Hendry Co. v. Moore*, 318 U.S. 133 (1943). But the states may not, under the guise of the "police power", alter, modify or in any manner whatever affect the substantive maritime law in matters not of purely local concern. If the rule were otherwise, it

could only lead to a proliferation of state statutes imposing a spate of conflicting and confusing obligations. By way of example, annexed as Table B is a comparison of some of the existing state statutes relating to water pollution. The states selected are those which have served briefs *Amici* in support of reversal, plus Alabama, because it adjoins Florida, and Alaska, because of its rather drastic provisions.

D. The Florida Act cannot be justified on Appellants' "gap" theory or their interpretation of W.Q.I.A. § 1161(o.)

The court below correctly dismissed Appellants' argument that W.Q.I.A. "left intentional loopholes or 'gaps' to be filled in by state legislation in order to accomplish congressional intent." (Brief, p. 83). As stated in Judge Tjoflat's opinion: "This theory presupposes that maritime law is an incomplete system, with numerous gaps that can be filled by state statutes. This is to say, if the maritime law affords no remedy, the states may provide one. The Supreme Court's recent decision in *Moragne v. States Marine Lines, Inc.* [*supra*, p. 30], clearly puts such a theory to rest." (A44).

Appellants also argue that state legislation such as the Florida Act is justified by § 1161(o) of W.Q.I.A.: "Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil into any waters within such State." It is elementary, however, that Congress cannot give to the States powers which they have surrendered to the Federal Government under the Constitution. *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920), *supra*, p. 25. Among the most important of these are the paramount power of Congress to legislate in the maritime field and the power of the federal judiciary to define the general maritime law which

is to prevail throughout all of the United States. As stated by the court below: "The statement that Congress did not intend to preclude state imposed liability for oil pollution simply means that states are free to enforce pollution control measures that are within their constitutional prerogative." (A46).

Conclusion

Florida is but one of many states bordering upon, or having navigable outlets to the sea. A number of these have already enacted water pollution statutes vitally affecting vessels of many flags engaged in international, interstate and intrastate commerce. These laws are by no means uniform, and their enforcement would lead to chaotic results. Still more American shipowners would surely be added to the growing list of those who have been obligated to discontinue operations in recent years, and many foreign owners would reluctantly find it necessary to stop trading their vessels to United States ports. The American public would be bound to suffer, as the end result would be shortages of oil and other products which depend on water transportation, and higher prices for such as might still be carried.

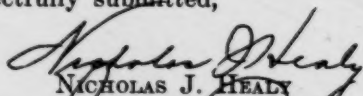
No responsible individual or company wants to see the marine environment spoiled. Every reasonable effort should be made to keep pollution damage at a minimum, but legislation, even on the national level, which imposes liabilities which cannot be insured against is not going to lessen the number of accidental discharges in the transportation of oil and other products which have come to be regarded as necessities of modern life, any more than high jury verdicts have lessened the number of automobile accidents. What will help will be improvements in the design of vessels and in the training of the officers

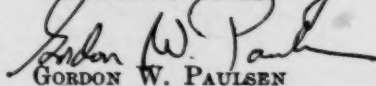
and crews who man them, and improvements in the methods employed by governmental authorities, by the oil and chemical companies, and by vessel operators in coping with accidental discharges.

Insofar as foreign-going ships are concerned, it is plain that the regulation of liability for pollution should be international in scope, and great progress has already been achieved in the movement to bring this about. Meanwhile, such regulation should remain with the Federal Government, which should also be left with the exclusive right to regulate pollution by vessels engaged in the domestic trades. To permit the states to enter the field would set the movement for international uniformity back many years, without any improvement whatever in the marine environment.

The decision below should be affirmed.

Respectfully submitted,


NICHOLAS J. HEALY


GORDON W. PAULSEN

*Attorneys for Appellees,
American Institute of Merchant Shipping,
Assuranceforeningen Gard, et al.*

HAIGHT, GARDNER, POOR & HAVENS

HEALY & BAILLIE

FOWLER, WHITE, GILLEN, HUMKEY,

KINNEY AND BOGGS, P.A.

DEWEY R. VILLAREAL, JR.

RAYMOND A. CONNELL

EMIL A. KRATOVIL, JR.

of Counsel

BLEED THROUGH POOR COPY

A-1

TABLE A

PROVISIONS OF FLORIDA

GENERAL MARITIME ACT DUPLICATING AND CONTRAVENING INTERNATIONAL LAW, FEDERAL STATUTES AND INTERNATIONAL CONVENTIONS

PROVISIONS

FLORIDA ACT

FEDERAL LAW AND INTERNATIONAL AGREEMENTS

Prohibited discharges.

Oil, gasoline, pesticides,
ammunition, other solvents, chlorine and
other hazardous materials. [§ 376.3(7); 376.4].

Oil [W.Q.I.A., 33 U.S.C. §1161(a)(1)(b)(1)], except as permitted under Convention for Prevention of Pollution of the Sea by Oil, as amended, (Art. III); other hazardous polluting substances specified by the President [33 U.S.C. § 1162(a)]; refuse matter of any kind [33 U.S.C. § 407].

Basis of liability for government cleanup costs.

Absolute liability. [§§ 376.11(5); 376.11(6)(a); 376.12].

Strict liability, excepting only act of God, act of war, negligence of U.S. Government, or act or omission of a third party. [W.Q.I.A., 33 U.S.C. § 1161(f)(1)].

Limit of liability for government cleanup costs.

No limit. [§ 376.12].

Lesser of \$100 per gross registered ton or \$14 million, in absence of willful negligence or willful act within owners' privity or knowledge. [W.Q.I.A., 33 U.S.C. § 1161(f)(1)].

BLEED THROUGH POOR COPY

TABLE A (Continued)

PROVISIONS	FLORIDA ACT	FEDERAL LAW AND INTERNATIONAL AGREEMENTS
Basis of liability for pollution damages (other than government clean-up costs).	Absolute. [See § 376.12; see Appellant's Brief, pp. 32-41].	Fault. [General maritime law; see <i>Fireman's Fund Ins. Co. v. Standard Oil Co.</i> , 339 F.2d 148 (9th Cir. 1964); <i>In re New Jersey Barging Corp.</i> , 168 F.Supp. 925 (S.D. N.Y. 1958); <i>The Clara</i> , 102 U.S. 200 (1880)]. (When Convention on Civil Liability for Oil Pollution Damage takes effect basis will become strict liability).
Limit of liability for pollution damages (other than government cleanup costs).	No limit. [See § 376.12 and Appellant's Brief, pp. 11, 63-69].	Value of vessel and "pending freight", in absence of privity or knowledge. [46 U.S.C. §§ 183-89]. (When Convention on Civil Liability for Oil Pollution Damage takes effect, limit of liability for all damages will be lesser of approximately \$146 per adjusted net registered ton or approximately \$15.4 million, in absence of owner's "actual fault or privity". When "Fund" Convention takes effect, claimants may recover up to a total of approximately \$32.5.

1

10-20-1917

10-20-1917

R
na

TABLE A (Continued)

PROVISIONS	FLORIDA ACT	FEDERAL LAW AND INTERNATIONAL AGREEMENTS
Required evidence of financial responsibility.	Insurance or other approved evidence of financial responsibility to secure all liabilities (Applies to all vessels). [§ 376.14(1); cf. Regulations, §§ 16B-16.08(1)-(5)].	million. (See p. 40, <i>supra</i>). Insurance or other approved evidence of financial responsibility in amount of lesser of \$100 per gross ton or \$14 million, to secure Government cleanup costs. (Applies to vessels of over 300 tons). [33 U.S.C. § 1161(p)(1)].
Vessel equipment, inspection and manning.	Vessels using Florida ports must be equipped with state approved containment gear and be manned by crews trained in its use and are subject to state inspection for seaworthiness, etc. [§ 376.7 (2) (a), (c), (d)].	Vessels must meet equipment requirements and inspection procedures established by the President [W. Q. I. A., 33 U.S.C. §1161(j)(1)(C), (D)], detailed requirements regulating construction, equipment and inspection under 46 U.S.C. §§ 361-436, 1960 Safety of Life at Sea Convention, and Ports and Waterways Safety and Environmental Quality Act, 1972.
Conditions for use of ports (in addition to evidence of financial responsibility).	Minimum weather and sea conditions, as determined by state employees [§ 376.7(2)(g)];	Certificate of inspection and compliance with Ports and Waterways Safety and Environmen-

[illegible]

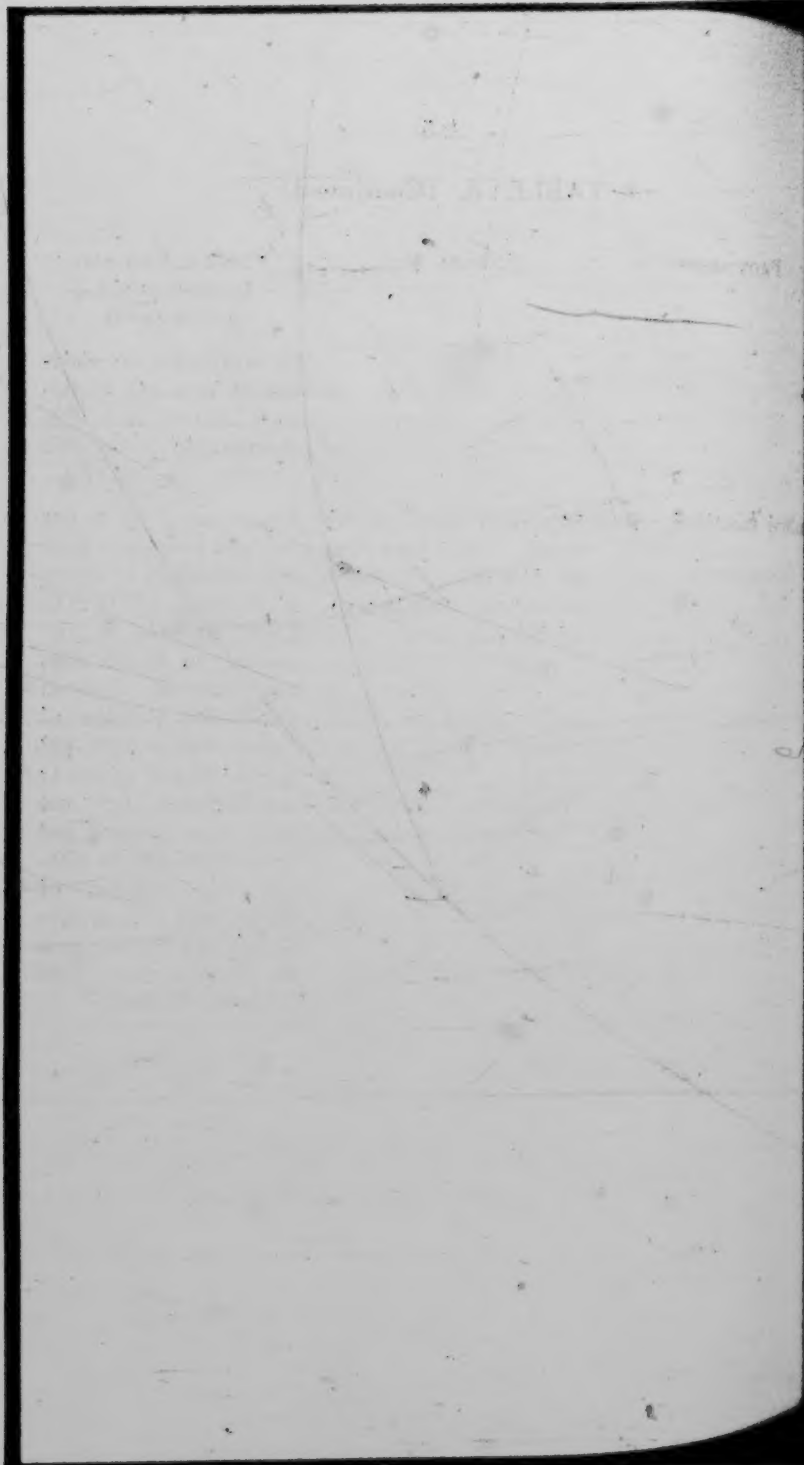
TABLE A (Continued)

PROVISIONS	FLORIDA ACT	FEDERAL LAW AND INTERNATIONAL AGREEMENTS
	master of vessel must file report and, inferentially, State may refuse entrance upon review of report. [§ 376.7(2)(h)(i)].	tal Quality Act of 1972. [P. L. 92-340 § 201(A)(3), (5), (6), (7); (B)(13)]; U. S. Coast Guard traffic control, including minimum sea conditions [<i>id.</i> § 101(3)(i)]; see also, Convention for Prevention of Pollution of the Sea by Oil, <i>as amended</i> , Article VII.
Reporting.	Discharge must be reported to state-appointed port manager, as well as to nearest Coast Guard Station [§ 376.7(2)(b)].	Discharge must be reported to Coast Guard unit in vicinity of discharge. [W.Q.I.A., 33 C.F.R. §§ 153.100 and 153.105].
Wrecks.	Abandonment of vessels without state agency's consent prohibited; owner subject to \$50,000 fine for each day abandoned vessel remains. [§§ 376.15(1) and 16].	Owner has right to abandon to U.S. [33 U.S.C. §§ 409-14], subject to rule of <i>Wyandotte Transportation Co. v. United States</i> , 389 U.S. 191 (1967).
Civil Penalties.	Up to \$50,000 per day for each day during which violation continues. [§§ 376.10; 376.16].	Up to \$10,000 per violation under W.Q.I.A. [33 U.S.C. § 1161(b)(5)]; \$500 to \$2,500 for violation of Refuse Act [33 U.S.C. §§ 407 <i>et seq.</i>];

BLEED THROUGH POOR COPY

TABLE A (Continued)

PROVISIONS	FLORIDA ACT	FEDERAL LAW AND INTERNATIONAL AGREEMENTS
criminal sanctions.	Imprisonment up to two years and fines up to \$10,000. (Violation constitutes felony). [§ 376.12].	up to \$10,000 for violation of Port and Waterways Safety and Environmental Quality Act of 1972 [P.L. 92-340]. Imprisonment up to one year and fines up to \$10,000 for failure to report a discharge [33 U.S.C. § 1161(b)(4)]; imprisonment up to 30 days and fines of \$500 to \$2,500 for violation of Refuse Act of 1899 [33 U.S.C. §§ 407 <i>et seq.</i>]; imprisonment for not more than 5 years and fines of \$5,000 to \$50,000 for violation of Ports and Waterways Safety and Environmental Quality Act, 1972 [Pub. L. 92-340].



B-1

T

COMPARISON OF STATE WATER POLLUTION

	DELAWARE	FLORIDA	GEORGIA
CUT nec-	Title 7, Part VII, Chapters 60, 61, 63, 64; and Title 29, Chapter 80, DELAWARE CODE and <i>Implementing Regulations</i> . (Delaware Water Pollution Control Laws).	Chapter 376, FLORIDA STATUTES (1970) (Florida Oil Spill Prevention and Pollution Control Act).	Chapter 126, GEORGIA CODE (Georgia Water Quality Control Act).
ance per-	Avoidable pollution or contamination of the oceans or beaches shall be prohibited, and no oil, tar, nor refuse of any kind shall be permitted to pass into the waters of the ocean. § 6419(a). No person shall cause or permit the discharge of substances which impair the uses, or violate the water quality requirements, of the waters of the state. <i>Reg.</i> § 3-3.1.	Oil, gasoline, pesticides, ammonia, chlorine, and other hazardous materials. §§ 376.3(7), 376.4.	Disposal of waste materials in or on waters of the state without a permit. Act. § 126-1-1.
	Acts or omissions preventable through exercise of a high degree of care. § 6419(b)(1)(2).	Absolute. § 376.11(5) (b), (c); 376.11(6) (a); 376.12.	Intentional or negligent discharge of waste materials. Strict liability for any toxic, flammable, or explosive materials. § 126-1-1.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutory provisions involved	2
Interest of the United States	3
Statement	3
Summary of argument	7
Argument	12

- I. Section 12 of the Florida Act cannot subject shipowners to unlimited liability for oil spills because of conflicting federal law, but is valid insofar as it subjects owners of terminal facilities to unlimited liability and sets the standard of recovery against owners of ships and terminal facilities for oil spill damages as liability without fault 12
 - A. The federal Limitation of Liability Act limits the liability of shipowners for their ships' torts despite contrary state law 12
 - B. Florida's subjection of terminal facilities to unlimited liability and imposition of absolute liability as the standard of recovery against ships and terminal facilities are valid 15

II

Argument—Continued

Page

1.	Unlimited liability with respect to terminal facilities	16
2.	Liability without fault for oil spills from vessels and terminal facilities	18
a.	Vessels	19
b.	Terminal facilities	26
3.	Summary	27
C.	International conventions now pending before the Senate would, if ratified, significantly affect the questions discussed above regarding the liability of ships for damage caused by oil spills	27
II.	Florida may not impose requirements with respect to the equipment carried on ships for containing oil spills, but the extent of the State's regulatory authority over terminal facilities should not be decided in this case	30
A.	Since uniform regulations are necessary in regard to the equipment and fittings required on ships plying the navigable waters of the United States, this is an area for exclusive federal regulation and individual States cannot impose their own requirements	30

III

Argument—Continued

Page

B. Although recent federal legislation gives the United States authority to regulate the operations of and equipment on terminal facilities, Congress recognized the States' concurrent authority to act in this area and the extent of Florida's authority in this respect cannot now be appropriately determined since neither the State nor the federal government has yet promulgated regulations governing terminal facilities	35
---	----

Conclusion	40
------------------	----

CITATIONS

Cases:

<i>Clara, The</i> , 102 U.S. 200	19
<i>Cleveland Terminal R.R. v. Steamship Co.</i> , 208 U.S. 316	19
<i>Cooley v. Board of Wardens</i> , 12 How. 298	24
<i>Coryell v. Phipps</i> , 317 U.S. 406	13
<i>Executive Jet Aviation, Inc. v. City of Cleveland, Ohio</i> , 448 F. 2d 151, certiorari granted, 405 U.S. 915	18
<i>Firemen's Fund Insurance Co. v. Standard Oil Co. of Cal.</i> , 339 F. 2d 148	18
<i>Gibbons v. Ogden</i> , 9 Wheat. 1	14, 23
<i>Green v. General Petroleum Corp.</i> , 205 Cal. 328	20
<i>Huron Cement Co. v. Detroit</i> , 362 U.S. 440	15, 23, 24, 31

IV

Cases—Continued

	Page
<i>Just v. Chambers</i> , 312 U.S. 383	24
<i>Kelly v. Washington</i> , 302 U.S. 1.....	10, 11, 24, 30, 31, 32, 38, 39
<i>Lake Carriers' Association v. McMullan</i> , No. 71-422, decided May 30, 1972.....	14
<i>Maryland Casualty Co. v. Cushing</i> , 347 U.S. 409	27
<i>Moragne v. States Marine Lines, Inc.</i> , 398 U.S. 375	14, 20
<i>Norwich Co. v. Wright</i> , 13 Wall. 104	13
<i>Peytavin v. Government Employees Insur-</i> <i>ance Co.</i> , 453 F. 2d 1121	18
<i>Phenix Insurance Co., Ex parte</i> , 118 U.S. 610	
<i>Plymouth, The</i> , 3 Wall. 20	18, 19
<i>Pope & Talbot, Inc. v. Hawn</i> , 346 U.S. 406	21
<i>Richardson v. Harmon</i> , 222 U.S. 96	13, 14
<i>Roanoke, The</i> , 189 U.S. 185	24
<i>Rodrigue v. Aetna Casualty Co.</i> , 395 U.S. 352	17, 26
<i>Romero v. International Term. Co.</i> , 358 U.S. 354	19, 24
<i>Rylands v. Fletcher</i> , 3 H.L. 330	20
<i>Seas Shipping Co. v. Sieracki</i> , 328 U.S. 85	20
<i>Southern Pacific Co. v. Jensen</i> , 244 U.S. 205	6, 18, 23
<i>Standard Dredging Co. v. Murphy</i> , 319 U.S. 306	23
<i>State, Department of Fish and Game v.</i> <i>S.S. Bournemouth</i> , 307 F. Supp. 922.....	19
<i>United States v. Standard Oil Co.</i> , 384 U.S. 224	21, 26

Cases—Continued	Page
<i>Victory Carriers, Inc. v. Law</i> , 404 U.S. 202	18
<i>Wilburn Boat Co. v. Fireman's Fund Insurance Co.</i> , 348 U.S. 310	23
<i>Willson v. Black-bird Creek Marsh Co.</i> , 2 Pet. 245	24

Constitution and statutes:

Constitution of the United States:

Article VI, Supremacy Clause	7, 12-13, 17
Commerce Clause	24, 30

Admiralty Extension Act, 46 U.S.C. 740	18, 19
--	--------

Limitation of Liability Act, 9 Stat. 635, as amended, 46 U.S.C. 181-189	7, 9, 13, 25
46 U.S.C. 183(a)	13, 16
46 U.S.C. 189	14

Oil Pollution of the Sea Act, 33 U.S.C. 1001-1015:

33 U.S.C. 1003	26
33 U.S.C. 1005	26

Par Value Modification Act, P.L. 92-268	29
---	----

Ports and Waterways Safety Act of 1972, Pub. L. 92-340, Title I, 92d Cong. (July 10, 1972)	11, 12, 35, 36, 38
Section 101	36
Section 101(7)	36
Section 102(b)	37
Section 201	35

Refuse Act of 1899:

33 U.S.C. 407	21, 26
33 U.S.C. 411	26

Constitution and statutes—Continued

	Page
28 U.S.C. 1333(1)	19
28 U.S.C. 2281	5
46 U.S.C. 91	39
46 U.S.C. 391a	11, 34
Water Quality Improvement Act of 1970, 84 Stat. 91, as amended, 33 U.S.C. 1161-1175	6, 8, 11, 12, 13, 24, 37
1161(b) (1)	20
1161(b) (2)	39
1161(f) (1)	16
1161(f) (2)	16
1161(j) (1)	31, 36, 37
1161(o) (1)	17, 35
1161(o) (2)	17, 35
1161(p) (3)	27
1171(b) (1)	38

Florida Oil Spill Prevention and Pollution
Control Act of 1970, ch. 70-244:

Section 2	22
Section 3(9)	3, 16, 36
Section 4	39
Section 6(6)	5
Section 7(2) (a)	4, 30
Section 7(2) (b)	5
Section 7(2) (c)	4
Section 7(2) (d)	30
Section 7(2) (e)	5
Section 7(2) (g)	4, 11, 35, 38, 39
Section 8	5
Section 10	5
Section 11	5
Section 11(6) (c)	4

VII

Constitution and statutes—Continued

Section 12	3, 4, 7, 8, 9, 12, 15, 16, 18, 23, 24, 26, 27	
Section 14(1)		15
Section 14(3)		27
Section 16		5
Section 23		5

Miscellaneous:

Basco, <i>Pneumatic Barriers for Oil Containment Under Wind, Wave and Current Conditions</i> , in <i>Proceedings of Joint Conference on Prevention and Control of Oil Spills</i> 381 (sponsored by American Petroleum Institute, June 15-17, 1971)		31
33 C.F.R. 124		39
33 C.F.R. 126		36
Coast Guard proposed regulations, 36 Fed. Reg. 24960-24965	11, 34, 36, 37	
Section 154.500-154.520		37
Section 154.530-154.545		37
Section 154.560		37
Section 155.310		32
Section 155.310(a)		32
Section 155.310(a)(1)		33
Section 155.310(a)(2)		33
Section 155.310(b)		33
Section 155.310(c)		33
Section 155.310(c)(1)		33
Section 155.310(c)(2)		33
Section 155.310(c)(3)		33
Section 155.320		33

Miscellaneous—Continued

	Page
Section 155.320 (a)	33
Section 155.320 (b)	33
Section 155.400	33
Section 155.400 (a)	34
Section 155.400 (b)	34
Section 155.400 (b) (1)	34
Section 155.400 (b) (2)	34
Section 155.400 (c)	34
Section 155.400 (d)	34
23 Cong. Globe, 331-332, 713-720, 776-777 (1851)	13
Currie, <i>Federalism and the Admiralty: "The Devil's Own Mess"</i> , 1960 Sup. Ct. Rev. 158	19, 24
Gilmore and Black, <i>The Law of Admiralty</i> (1957)	13, 19
H. Rep. No. 92-563, 92d Cong., 1st Sess. (1971)	36
<i>International Convention on Civil Liability for Oil Pollution Damage</i> , Exec. Doc. G., 91st Cong., 2d Sess. (1970)	21, 28
<i>International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage</i> , Exec. Doc. K, 92d Cong., 2d Sess. (1972)	21
March, "Dynamic Keel" Oil Containment System, in <i>Proceedings of Joint Conference on Prevention and Control of Oil Spills</i> 369 (sponsored by American Petroleum Institute, June 15-17, 1971)	31

Miscellaneous—Continued

Page

Marks, Geiss and Hirshman, <i>Theoretical and Experimental Evaluation of Oil Spill Control Devices</i> , in <i>Proceedings of Joint Conference on Prevention and Control of Oil Spills</i> 393 (sponsored by American Petroleum Institute, June 15-17, 1971)	31
McCoy, <i>Oil Spill and Pollution Control: The Conflict Between State and Maritime Law</i> , 40 G.W. L. Rev. 97 (1971) ..	19
Morris on Torts, 240-255 (1953)	20
Note, <i>Toward a State Remedy for Oil Spill Damages: An Insurance Approach</i> , 47 N.Y.U. L. Rev. 60 (1972) ..	22
Presidential Message Transmitting Two Conventions and Amendments Relating to Pollution of the Sea by Oil, Exec. Doc. G, 91st Cong., 2d Sess. (1970)	28, 29
Presidential Message Transmitting Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage and Amendments to the 1954 Prevention of Pollution of the Sea by Oil Convention, Exec. Doc. K, 92d Cong., 2d Sess. (1972)	28, 29
Selvig, <i>Towards Strict Shipowner Liability: Recent Trends in Norwegian Law on Maritime Torts</i> , 2 J. Maritime L. and Comm. 383 (1971)	20

BLEED THROUGH POOR COPY

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1082

REUBIN O'D. ASKEW, ET AL., APPELLANTS

v.

THE AMERICAN WATERWAYS OPERATORS, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

OPINION BELOW

The opinion of the three-judge district court (App. 39-55) is reported at 335 F. Supp. 1241.

JURISDICTION

The district court entered its order and final judgment enjoining enforcement of the Florida Oil Spill Prevention and Pollution Control Act of 1970, ch. 70-244, on December 10, 1971 (App. 48). Appellants filed their notice of appeal on December 23, 1971

(J.S. 2, J.S. Addendum). Probable jurisdiction was noted on April 17, 1971 (405 U.S. 1063). This Court's jurisdiction rests upon 28 U.S.C. 1253.

QUESTIONS PRESENTED

The United States will discuss the following questions:

1. Whether Section 12 of the Florida Act is valid insofar as it seeks to subject vessels to unlimited liability for damage from oil spills or discharges.
2. Whether Section 12 of the Florida Act is valid insofar as it subjects terminal facilities to unlimited liability for damages from oil spills or discharges.
3. Whether Section 12 of the Florida Act is valid insofar as it makes vessels and terminal facilities covered by the Act liable without fault for damage caused by their discharge or spilling of oil.
4. Whether Florida may validly require certain equipment to be carried by ships visiting its ports in order to prevent damage from oil spills.
5. Whether Florida may validly require certain equipment to be carried by terminal facilities within the State in order to prevent damage from oil spills.

STATUTORY PROVISIONS INVOLVED

The Florida Oil Spill Prevention and Pollution Control Act, ch. 70-244, is set forth in the Appendix, at pp. 56-73.

The pertinent provisions of the Water Quality Improvement Act of 1970, 84 Stat. 91, as amended,

33 U.S.C. 1161-1175, are set forth in the Appendix, at pp. 75-90.

The pertinent provisions of the Limitation of Liability Act, 9 Stat. 635, as amended, 46 U.S.C. 181-189, are set forth in the Appendix, at pp. 91-92.

INTEREST OF THE UNITED STATES

The substantial interest of the United States in the prevention and control of oil spills from ships and waterfront facilities is indicated by federal legislation and pending international conventions dealing with the matter, which we discuss *infra*. The Court's decision in this case is likely to have a significant impact on the implementation and enforcement of these federal regulatory measures and on federal-state relationships with respect to oil pollution control.

STATEMENT

This is an appeal from the decision of a three-judge district court holding unconstitutional the Florida Oil Spill Prevention and Pollution Control Act of 1970, ch. 70-244. Florida passed the Act for the purpose of preventing and controlling oil spills into the State's navigable waters and to provide for recovery of damages incurred by the State and private persons as a result of such spills. The Act applies to all "terminal facilities" (any waterfront facility used for drilling for oil or handling the transfer or storage of oil from ships) within the State, Section 3(9), and to all ships destined for or leaving those facilities, Section 12.

With respect to oil discharges from terminal facilities and ships, Section 12 of the Act provides that the State may recover, on behalf of itself and private persons, all damages incurred as a result of the spill and that, in such cases, it shall not be necessary for the State to prove negligence. Section 11(6)(c), however, confers discretion upon the state Department of Natural Resources to allow the owner of a terminal facility or vessel to be relieved of liability if the spill resulted from an act of war, an act of God, an act of government, or the act or omission of a third person. Each owner or operator of a ship or terminal facility covered by the Act must establish evidence of financial responsibility by insurance or a surety bond, under regulations promulgated by the responsible state agency.¹

Other provisions of the Florida Act set up a comprehensive regulatory scheme concerning the equipment and operations of terminal facilities and ships visiting Florida ports, to be administered by the state Department of Natural Resources. The state agency is authorized to require, through regulations, that facilities and ships have certain oil containment gear on hand, Section 7(2)(a) and (g), and that ships allow the state port manager to board for the purpose of determining the ship's seaworthiness and whether proper containment gear is being carried, Section 7(2)(c).

¹ The regulations (App. 73-74) require shipowners to establish and maintain evidence of financial responsibility in an amount not to exceed \$100 per gross ton of the ship or \$5,000,000, whichever is less.

Terminal facility owners or operators must procure a license from the state agency, which shall be issued upon the applicant's showing that he "can provide all necessary equipment to prevent, contain and remove discharges of oil and other pollutants," Section 6(6). The state agency also has the responsibility to set up a system for reporting prohibited discharges, Section 7(2)(b), to develop a plan to cope with oil pollution when it occurs, Section 7(2)(e), and to coordinate cleanup efforts with the federal government, Section 8. Violation of the Act or any regulation issued thereunder is punishable by a civil penalty of not more than \$50,000, Sections 10 and 16.² The agency is financed from the Florida coastal protection fund, to which shall be credited all license fees and penalties, Section 11.

Section 23 provides that all provisions of the Florida Act are severable and that if any provision is held unconstitutional, the decision shall not affect the other provisions.

Merchant shippers using Florida ports, maritime insurers, the Florida barge and towing industry, and terminal facility owners brought suit against the State and its officers in the United States District Court for the Middle District of Florida, challenging the Florida Act on federal constitutional and statutory grounds, and seeking an injunction against its enforcement (App. 1-26). Pursuant to 28 U.S.C. 2281, a three-judge court was convened.

² The penalty provisions do not apply to any discharge promptly reported and removed in accordance with the agency's regulations.

The court held the entire Florida Act "null and void and without effect" and enjoined its enforcement (App. 47). The court noted that federal "[m]aritime law governs virtually every facet of the shipping industry" and that there is extensive federal legislation in the area, including the Water Quality Improvement Act of 1970 (WQIA), 84 Stat. 91, 33 U.S.C. 1161-1175, which subjects owners of vessels or terminal facilities to liability without fault up to \$14,000,000 or \$8,000,000, respectively, for cleanup costs incurred by the federal government as a result of oil spills, and which authorizes the President to issue regulations requiring that vessels and terminal facilities maintain equipment to prevent spills (App. 40-41).

In the court's view, the Florida Act would constitute an unwarranted intrusion into federal admiralty jurisdiction. It would subject shipowners to far greater liability than that imposed by the WQIA and, unlike the WQIA, would not allow shipowners to defend on the basis that the oil spill was caused by an act of God, an act of war, or the act or omission of a third party (App. 42). Moreover, the court believed that the Florida Act would alter general maritime law, under which recovery in oil spill cases would be allowed only if the injured party proved that the ship had been negligently operated or equipped (App. 42-43).

Citing *Southern Pacific Co. v. Jensen*, 244 U.S. 205, the court concluded that "[i]t is well settled that state legislation is invalid where it is in con-

travention with general admiralty rules * * *” (App. 43), and that here the Florida Act would destroy uniformity with respect to maritime affairs (App. 44). The court rejected the argument that in the absence of a federal statute or definite maritime rule on the subject, state law must govern (App. 46).

Although the Florida Act contains a severability clause, the court struck down the entire statute because all of the provisions were “interwoven in purpose and scheme” (App. 47).

SUMMARY OF ARGUMENT

I

A

The federal Limitation of Liability Act, 9 Stat. 635, as amended, 46 U.S.C. 181-189, limiting recovery to the value of the ship and her pending freight, governs the extent of a shipowner's liability for injuries caused by the ship, including oil spills. Under the Supremacy Clause, Section 12 of the Florida Act can not extend the limits set by this federal Act. However, we do not believe Section 12 should be declared invalid in this regard since it is susceptible of an interpretation that would avoid any conflict with federal law; this Court should leave open the opportunity for a state court to interpret Section 12 as subjecting shipowners to liability for all damages up to the maximum set by federal law.

B

1. The Florida law is valid insofar as it subjects operators of terminal facilities to unlimited liability

for damage from oil spills. The federal Limitation of Liability Act applies only to vessels, and the federal Water Quality Improvement Act of 1970 (WQIA), 33 U.S.C. 1161-1175, although limiting a terminal facility owner's liability to the United States for clean-up costs, does not deal with liability to States and private persons for damages caused by oil spills. Moreover, even if a discharge of oil from a terminal facility were considered a maritime tort and thus subject to general maritime law, there would be no conflict with Section 12 of the Florida Act since the terminal facility owner would not, in any event, be able to limit his liability under federal law. The Florida law in this regard at most merely restates present federal law.

2. We believe Section 12 of the Florida Act to be valid insofar as it sets the standard of recovery against shipowners and terminal facility owners as liability without fault.

a. Although a vessel's discharge of oil into navigable waters could be considered a maritime tort, it is not clear that the standard of liability would be negligence as the court below assumed. This area of maritime law might, in light of current trends, develop a theory of liability without fault. But even if negligence is considered to be the present standard, there is no policy of maritime law opposed to liability without fault for damages caused by oil spills from ships.

On the other hand, Florida has a legitimate interest in applying its own standard of liability in view

of the potential impact of oil spills on its environment and economy. There may be substantial difficulties in proving negligence in such cases, particularly since the only witnesses may be employees of the vessel operator and since the acts resulting in the spill may have been committed far away from the area of the coast affected. Further, Florida could properly conclude that liability without fault would encourage a higher degree of care with respect to ships destined for and leaving ports within the State. Since these are the only ships covered by Section 12, Florida law also reflects the State's legitimate policy judgment that such ships, using Florida ports for profit, should bear the burden of loss if their oil damages the State's environment and citizens, even if the ship had taken due care to prevent an accident.

Although application of Florida's standard of liability might create a lack of uniformity in general maritime law, this is not a subject requiring uniform, federal regulation. The primary conduct of those engaged in maritime affairs would not be affected since federal law already requires vessels to exercise the highest degree of care to prevent oil spills. In addition, there would be no unwarranted disruption in the financial planning of shipowners or their insurers since, as we have argued above, the federal Limitation of Liability Act would govern the extent of recovery, thereby giving notice of the limits of the shipowner's liability before the ship's voyage begins.

b. The considerations we have just summarized with respect to vessels are, for the most part, all

the more applicable to terminal facilities; the Florida law regarding the standard of liability for oil spills is therefore valid as applied to the owners of such facilities.

C

International Conventions, currently pending before the Senate, provide that shipowners shall be liable without fault to governments and private persons for damages caused by oil spills. Under these Conventions, shipowners may limit their liability to \$15 million but persons or governments injured to a greater extent may recover up to \$32.4 million from an international fund established by the Conventions. Moreover, recovery may be had against the fund even if the shipowner would have a defense and even if the person injured cannot identify the source of the oil spill. Although we believe these Conventions, if ratified, would supersede state laws regarding liability for oil spills from ships, we are of the view that in the meantime Florida's liability provision validly governs such liability to the extent indicated above.

II

A

The Florida Act directs the state agency to require ships to carry certain "containment gear". However, diverse equipment regulations for ships from state to state would pose an unreasonable burden on maritime commerce and under *Kelly v. Washington*, 302 U.S. 1, 15, state law cannot govern in this area even in the absence of any federal regulations.

The matter will not, however, be unregulated since the WQIA confers authority upon the President to establish requirements for equipment on ships to prevent discharge of oil. Pursuant to this authority, the Coast Guard has published extensive and detailed proposed regulations, which will shortly become final. Also, recent amendments to 46 U.S.C. 391a give the Coast Guard broad regulatory authority over equipment and appliances on ships to prevent and mitigate damage to the marine environment. Pub. L. 92-340, Section 201, 92d Cong. (July 10, 1972). Although these comprehensive federal laws suggest that Congress has occupied the field and thus preempted the States from acting in this area, we believe it unnecessary to resolve this question because under *Kelly* the States would be precluded from regulating equipment on ships even in the absence of federal legislation on the subject.

B

The Florida Act also directs the state agency to regulate equipment on terminal facilities in order to prevent damage from oil pollution. Section 7(2)(g). Both the WQIA and the federal Ports and Waterways Safety Act of 1972 confer similar regulatory authority upon the President; and the Coast Guard, acting under the WQIA, has published extensive proposed regulations dealing with the subject of the equipment and operations of terminal facilities. 36 Fed. Reg. 24960. However, the WQIA and the Ports and Waterways Safety Act recognize state authority to act concurrently in this area to a limited extent and

the latter statute specifically provides that States may require higher safety standards than those prescribed by the Coast Guard. Therefore, since Florida has not yet promulgated regulations dealing with equipment on terminal facilities and since the Coast Guard's proposed regulations are not yet final, we believe it would be inappropriate for the Court to attempt, at this time, to define the precise extent of Florida's authority in this area, especially since the Florida Act may be interpreted to allow the State to act only in conformity with the WQIA and the Ports and Waterways Safety Act, thereby avoiding any conflict with federal law.

ARGUMENT

I

SECTION 12 OF THE FLORIDA ACT CANNOT SUBJECT SHIPOWNERS TO UNLIMITED LIABILITY FOR OIL SPILLS BECAUSE OF CONFLICTING FEDERAL LAW, BUT IS VALID INsofar AS IT SUBJECTS OWNERS OF TERMINAL FACILITIES TO UNLIMITED LIABILITY AND SETS THE STANDARD OF RECOVERY AGAINST OWNERS OF SHIPS AND TERMINAL FACILITIES FOR OIL SPILL DAMAGES AS LIABILITY WITHOUT FAULT

A. The Federal Limitation of Liability Act Limits the Liability of Shipowners For Their Ships' Torts Despite Contrary State Law

Because of a conflict with federal law, Section 12 of the Florida Act (App. 68-69) is, in our view, ineffective (under the Supremacy Clause in Article

VI of the Constitution) insofar as it purports to subject shipowners to unlimited liability for damages caused by oil discharged from ships. The federal Limitation of Liability Act,³ enacted in 1851 in order to put American shipping in competitive equality with British shipping,⁴ provides that the liability of the owner of a vessel shall not exceed his interest in the ship and her pending freight⁵ when the ship causes injury without his "privity or knowledge."⁶

There is no doubt that the Limitation of Liability Act applies to damages caused by oil spills from ships, even if the injury occurs on shore.⁷ In *Ex parte Phoenix Insurance Co.*, 118 U.S. 610, where sparks from a ship's smokestack caused a fire on shore, the Court held that the shipowner's liability was not limited since the federal Act applied only to maritime torts, which traditionally this was not because the injury was consummated on land. Later, however, in *Richardson v. Harmon*, 222 U.S. 96, where a ship collided with a bridge and the shipowner was

³ 9 Stat. 635, as amended, 46 U.S.C. 181-189.

⁴ See 23 Cong. Globe 331-332, 713-720, 776-777 (1851).

⁵ *Norwich Co. v. Wright*, 13 Wall. 104, held that, for purposes of the Act, the owner's interest must be valued after the accident or loss, not at the beginning of the voyage.

⁶ 46 U.S.C. 183(a); see *Coryell v. Phipps*, 317 U.S. 406; Gilmore and Black, *The Law of Admiralty* 663-748 (1957).

⁷ The Water Quality Improvement Act of 1970, 33 U.S.C. 1161-1175, creates an exception to the Limitation of Liability Act with respect to recovery by the federal government for the costs of cleaning up oil discharged by ships. See p. 16 n. 12, *infra*.

sued under state law, the Court decided that an 1884 amendment to the Act, see 46 U.S.C. 189, extended its coverage to include non-maritime torts.

As thus interpreted, the federal Limitation of Liability Act limits a shipowner's liability for oil spills whether the injury is consummated onshore or off. But under appellants' interpretation (Br., pp. 6, 33), Section 12 of the Florida Act purports to impose unlimited liability upon shipowners in such situations. There is thus a direct conflict between federal and state law, and the federal law prevails. *Gibbons v. Ogden*, 9 Wheat. 1, 210-211; *Richardson v. Harmon*, *supra*.

We do not believe, however, that it necessarily follows that this portion of Section 12 of the Florida Act should be declared invalid. The statute does not mention the phrase "unlimited liability," but instead states only that vessels and terminal facilities that discharge oil or other pollutants "shall be liable to the state for all costs of cleanup or other damage incurred by the state and for damages resulting from injury to others" (App. 68). No Florida court has yet interpreted this provision^{*} and it appears likely that when and if the question does arise, the state court would consider Section 12 in light of the federal Limitation of Liability Act and interpret it accordingly. Cf. *Lake Carriers' Association v. McMullan*, No. 71-422, decided May 30, 1972, slip op.

^{*} The Florida certification procedure was not utilized in this case. See *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 377.

at p. 13. This could result in a construction that shipowners are liable under Section 12 for all damages up to the maximum set by federal law. Since there would in that event be no conflict with the Limitation of Liability Act,⁹ this Court should leave open the opportunity for such a construction by declaring only that if Section 12 is interpreted to impose liability without limit upon shipowners, it must give way to the federal Limitation of Liability Act.¹⁰

B. Florida's Subjection of Terminal Facilities to Unlimited Liability And Imposition of Absolute Liability As the Standard of Recovery Against Ships And Terminal Facilities Are Valid

In all other respects, we believe that Section 12 of the Florida Act is valid.

⁹ The Court has often warned against "seeking out conflicts between state and federal regulation where none clearly exists." *Huron Cement Co. v. Detroit*, 362 U.S. 440, 446.

¹⁰ The court below did not separately discuss Section 14(1) of the Florida Act, requiring owners of terminal facilities or vessels to maintain evidence of financial responsibility with the State pursuant to rules and regulations promulgated by the Florida Department of Natural Resources. The regulations now require vessel owners to establish financial responsibility "in an amount not to exceed \$100 per gross ton of such vessel or \$5,000,000 whichever is lesser" (App. 74).

Since these regulations were presumably based on the premise that shipowners are subject to unlimited liability under Section 12 of the Florida Act, it is reasonable to expect that they will be revised if, as we urge, this Court holds that the federal Limitation of Liability Act limits the amount of recovery against shipowners, despite Section 12 of the Florida Act.

1. *Unlimited liability with respect to terminal facilities.* The provision in Section 12 of the Florida Act dealing with the extent of liability applies not only to oil spills from vessels, which we have discussed above, but also to oil spills from "terminal facili[ties]." ¹¹ In contrast, the federal Limitation of Liability Act applies only to "vessels," see 46 U.S.C. 183(a), and the Florida Act, insofar as it imposes unlimited liability upon terminal facilities, is therefore not in conflict with this federal Act.

Nor do we believe this aspect of the Florida Act to be in conflict with the federal Water Quality Improvement Act of 1970 (WQIA), 84 Stat. 91, 33 U.S.C. 1161-1175, which provides that an owner or operator of an offshore or onshore facility shall be liable to the United States in an amount not to exceed \$8,000,000 for the costs incurred by the United States in cleaning up oil discharged by the facility.¹² 33 U.S.C. 1161(f)(2).¹³ Section 12 of the Florida

¹¹ Section 3(9) defines "terminal facilit[ies]" to include onshore and offshore facilities for "drilling for, pumping, storing, handling, transferring, processing, or refining oil or other pollutants * * *" (App. 59).

¹² Similar liability, limited to \$100 per gross ton or \$14,000,000, whichever is less, is imposed upon vessels. 33 U.S.C. 1161(f)(1).

¹³ The owner or operator is relieved of liability to the United States if he proves "that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses * * *." 33 U.S.C. 1161(f)(2).

Act concerns liability to the State and private persons for damage caused by oil spills—a subject not regulated by the WQIA, which deals only with liability to the federal government. Moreover, the WQIA specifically states that it shall not “affect or modify” the obligations of “any owner or operator of any onshore facility or offshore facility to any person or agency under any provision of law for damages to any publicly-owned or privately-owned property resulting from a discharge of any oil or from the removal of any such oil.” 33 U.S.C. 1161 (o)(1). And the WQIA further provides that it shall not preempt any State from imposing “any requirement or liability with respect to the discharge of oil into any waters within such State.” 33 U.S.C. 1161(o)(2).

Thus, the Florida law is valid in this regard unless for some other reason the Supremacy Clause deprives the State from holding terminal facilities liable for all recoverable damages for oil spills. In our view, the only possible basis for doubt about the State's authority on this matter would be that suits dealing with oil spills from terminal facilities into navigable waters may be within the federal admiralty jurisdiction, even if the source of the oil spill is land-based and not a “vessel,”¹⁴ and that state law cannot serve as the decisional rule in such cases because it offends general maritime law. However,

¹⁴ Terminal facilities are not “vessels” under general maritime law. See *Rodrigue v. Aetna Casualty Co.*, 395 U.S. 352, 360.

the point is immaterial here. For there is no federal law, statutory or otherwise, limiting the liability of terminal facilities for damages to a State or a private individual. Thus, even if an action for damages caused by a terminal facility's discharge of oil onto navigable waters were considered a maritime tort in all cases,¹⁵ Section 12 of the Florida Act merely restates the present maritime law insofar as it provides that there is no limitation on recovery for damages from owners or operators of such facilities.

2. *Liability without fault for oil spills from vessels and terminal facilities.* As far as Section 12 of the Florida Act is concerned, the only remaining question is whether the standard of recovery set forth in that provision—liability without fault—would govern in suits for damages from oil spills against vessels and terminal facilities covered by the Florida Act, or whether, instead, general maritime law must control. The question is important because, at least since

¹⁵ Compare *Firemen's Fund Insurance Co. v. Standard Oil Co. of Cal.*, 339 F. 2d 148 (C.A. 9), with *The Plymouth*, 3 Wall. 20, 35 (in order for there to be a maritime tort "the wrong and injury complained of must have been committed wholly upon the high seas or navigable waters, or, at least, the substance and consummation of the same must have taken place upon these waters to be within the admiralty jurisdiction"), and *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio*, 448 F. 2d 151 (C.A. 6), certiorari granted, 405 U.S. 915; *Peytavin v. Government Employees Insurance Co.*, 453 F. 2d 1121 (C.A. 5).

The Admiralty Extension Act, 46 U.S.C. 740, which in part overruled *The Plymouth*, *supra*, applies only to damages caused by vessels. See *Victory Carriers, Inc. v. Law*, 404 U.S. 202.

Southern Pacific Co. v. Jensen, 244 U.S. 205, decided in 1917, this Court has adhered to the principle that, in maritime cases, the same law must be applied regardless of whether suit is brought in the federal admiralty court or in state court under the "savings clause" of 28 U.S.C. 1333(1). See *Romero v. International Term. Co.* 358 U.S. 354, 373-374. And when state law differs from the general maritime law, the relevant state and federal interests should be considered in determining which law should prevail.¹⁶

a. *Vessels*. The court below correctly recognized that a vessel's discharge of oil into navigable waters could be considered a maritime tort,¹⁷ even if the injury were consummated on land.¹⁸ But it is less clear what the standard of liability would, or should, be for this type of maritime tort. While general maritime tort law is doubtless rooted in negligence,¹⁹ admiralty courts have also imposed strict liability,²⁰ particularly in regard to injuries to seamen under the concept of "maintenance and cure" and to long-

¹⁶ See generally Currie, *Federalism and the Admiralty: "The Devil's Own Mess,"* 1960 Sup. Ct. Rev. 158.

¹⁷ See Gilmore and Black, *The Law of Admiralty* 21 (1957); *State, Department of Fish and Game v. S.S. Bournemouth*, 307 F. Supp. 922, 924 (C.D. Cal.).

¹⁸ Before 1948, when the Admiralty Extension Act, 46 U.S.C. 740, took effect, the causing of damages onshore by a vessel in navigable waters did not constitute a maritime tort. *The Plymouth*, 3 Wall. 20; *Cleveland Terminal R.R. v. Steamship Co.*, 208 U.S. 316.

¹⁹ See *The Clara*, 102 U.S. 200.

²⁰ See McCoy, *Oil Spill and Pollution Control: The Conflict Between State and Maritime Law*, 40 G.W. L. Rev. 97, 108 (1971).

shoremen and others under the doctrine of "unseaworthiness."²¹ And if one searches for common law analogues to the discharge of oil by vessels, there is the well-known English case of *Rylands v. Fletcher*, 3 H.L. 330 (1868), where the court held the defendant strictly liable for the escape of water from his dam onto another's land, and thereby fostered the idea that enterprises should pay for damages resulting from their enterprise, especially when the activity conducted for profit involves risks despite the observance of due care.²² With the recent enactment of the Water Quality Improvement Act, 33 U.S.C. 1161-1175, federal legislation at least has moved in that direction in regard to oil spill cleanup costs incurred by the federal government. Moreover, Congress has declared in that Act "that it is the policy of the United States that there should be no discharges of oil into or upon the navigable waters of the United States," 33 U.S.C. 1161(b)(1), and general maritime law surely would take this declaration of national policy into account.²³

²¹ See, e.g., *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 93-96.

²² See *Morris on Torts* 240-255 (1953); see also *Green v. General Petroleum Corp.*, 205 Cal. 328, holding the owner of an oil drilling operation liable for damages caused by a blow-out even though the drilling was not conducted negligently.

²³ See *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, indicating the influence of legislation on the development of general maritime law. Cf. Selvig, *Towards Strict Shipowner Liability: Recent Trends in Norwegian Law on Maritime Torts*, 2 J. Maritime L. and Comm. 383 (1971).

[Footnote continued on page 21]

Nevertheless, whether the general maritime law would develop a negligence theory of recovery or, instead, a type of liability without fault is difficult to predict.²⁴ But even if one assumes, as did the court below (App. 42-43), that the standard of liability for this kind of maritime tort is negligence, there is nothing in the general maritime law to indicate a negative policy opposed to liability without fault in such cases.²⁵

²⁴ [Continued]

See also the Refuse Act of 1899, 33 U.S.C. 407, making it a criminal offense to discharge refuse into the navigable waters of the United States. *United States v. Standard Oil Co.*, 384 U.S. 224, held that "refuse" includes oil.

²⁵ The question may become moot in any event if the Senate ratifies the pending *International Convention on Civil Liability for Oil Pollution Damage*, Exec. Doc. G, 91st Cong., 2d Sess., at pp. 19-27 (1970), which provides that a shipowner shall be liable for all pollution damage caused by oil that has escaped or been discharged from his ship, unless he proves that the damage resulted from an act of God, an act of war, negligence of any government responsible for maintaining navigational aids, or an act or omission by a third party with intent to cause damage. *Id.* at 20. See also *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage*, Exec. Doc. K, 92d Cong., 2d Sess., pp. 1-20 (1972), which allows compensation in addition to that provided by the Civil Liability Convention and allows recovery in additional cases (*e.g.*, spills caused by an act of God). See pp. 27-29, *infra*.

²⁶ The state law is therefore not invalid under the principle of *Pope & Talbot, Inc. v. Hawk*, 346 U.S. 406, 409-410 ("While states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court.").

On the other hand, there are substantial state interests underlying Florida's imposition of absolute liability. Florida found, as Section 2 of the Act states, that oil pollution poses grave and immediate dangers to the State's seacoast, and, as a consequence, threatens the State's environment, the owners and users of shorefront property, the livelihood of those within the State who derive their living from marine-related activities, and the beauty of the Florida coast, which the State considers best used as a source of public and private recreation (App. 56-57).

In light of the potential impact of oil spills on the environment and economy of the State, we believe Florida has a legitimate concern for the application of its own law regarding the basis for liability.²⁶ If the standard of negligence would otherwise control, this could present serious obstacles to the granting of some measure of compensation for damages suffered by the State and its citizens from oil spills. The problems of proof of negligence in such cases are obvious. Employees of the vessel operator may be the only witnesses to the spill; it may be difficult to determine precisely why the spill occurred; and the acts resulting in the spill may have been committed far away from the damaged beach or the particular area of the coast affected.²⁷

²⁶ Other States have also imposed liability without fault with respect to oil spills from ships. See Note, *Toward a State Remedy for Oil Spill Damages: An Insurance Approach*, 47 N.Y.U. L. Rev. 60, 65 n. 29 (1972).

²⁷ See Note, *Toward a State Remedy for Oil Spill Damages: An Insurance Approach*, 47 N.Y.U. L. Rev. 60, 61 (1972).

In addition, Florida could properly conclude that the standard of absolute liability rather than negligence would encourage a higher degree of care. It is relevant here that the liability-without-fault provision in Section 12 of the Florida Act applies only to ships destined for or leaving terminal facilities within the State. Since these vessels thus have a significant nexus with the State and are operating for profit by using Florida ports, the State's regulatory measure legitimately expresses Florida's policy judgment that such ships should bear the burden of loss if the State's beaches are fouled with oil from the ship, even if due care is taken to prevent a mishap. Florida has, in short, legislated within the traditional bounds of the police power in order to protect its citizens and their environment.²⁸

Of course, if Florida law rather than the general maritime law controls, this might lead to a lack of uniformity with respect to the standard of liability for oil pollution by ships. But that, in itself, does not necessarily mean general maritime law must prevail. Insofar as *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216, held that state law may never interfere with the uniformity of maritime law, the "case has already been severely limited, and has no vitality beyond that which may continue as to state workmen's compensation laws." *Standard Dredging Co. v. Murphy*, 319 U.S. 306, 309.²⁹ Instead, "[u]ni-

²⁸ See *Gibbons v. Ogden*, 9 Wheat. 1; *Huron Cement Co. v. Detroit*, 362 U.S. 440.

²⁹ See also *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 321 n. 29.

formity is required only when the essential features of an exclusive federal jurisdiction are involved." *Just v. Chambers*, 312 U.S. 383, 392; see also *Romero v. International Term. Co.*, 358 U.S. 354, 373. Cf. *Cooley v. Board of Wardens*, 12 How. 298; *Willson v. Black-bird Creek Marsh Co.*, 2 Pet. 245.

Whether a state law must fall "because the subject is one as to which uniformity of regulation is required," *Kelly v. Washington*, 302 U.S. 1, 14, requires a balancing of the particular state and federal interests involved;²⁰ in this respect, the issue is not unlike that presented in cases dealing with the validity of state laws affecting interstate commerce. Indeed, in maritime cases involving state regulatory measures to maintain health, safety or the general welfare, this Court has often spoken in terms of the Commerce Clause, rather than admiralty jurisdiction.²¹

We have already discussed the important state interests and the policies underlying Section 12 of the Florida Act. As against this, there is the federal concern, identified by the Court in *The Roanoke*, 189 U.S. 185, 195, that "it is almost impossible for [the master] * * * to acquaint himself with the laws of each individual State he may visit * * *." But this consideration has little force here. The federal Water Quality Improvement Act puts vessels on notice that

²⁰ See Currie, *Federalism and the Admiralty: "The Devil's Own Mess,"* 1960 Sup. Ct. Rev. 158, 170-174.

²¹ Currie, *Federalism and the Admiralty*, *supra*, at 170; see, e.g., *Kelly v. Washington*, 302 U.S. 1, 14-16; *Huron Cement Co. v. Detroit*, 362 U.S. 440, 448.

they are expected to exercise utmost care in preventing oil spills;²² the imposition by various coastal States of strict or absolute liability in place of a negligence standard under general maritime law would simply reinforce the ship's preexisting duty. There would thus be no prejudicial effect on the primary conduct of those engaged in maritime affairs resulting from a lack of uniformity in this area of maritime law.

Nor do we believe that Florida's law must fall on the basis that absolute liability rather than negligence would unreasonably expose shipowners to vast liability to the detriment of the federal interest in promoting maritime commerce. As we have argued above (pp. 12-15, *supra*), the federal Limitation of Liability Act now limits the extent of recovery against a shipowner despite contrary state law. Likewise, the standard of liability set by a State cannot extend the maximum amount recoverable against a shipowner. Thus, if Florida's liability standard applied, the shipowner would nevertheless know the limits of his liability before the ship's voyage began and he would also know that this would not change from state to state even if, in different states, the basis for recovery varied. A lack of uniformity therefore would not cause any unwarranted disruption in the financial planning of persons engaged in maritime affairs or their insurers. In sum, since application of Florida's absolute liability standard would not contravene the federal interest in the general har-

²² See pp. 13 n. 7, 16, 20, *supra*.

mony of maritime affairs, and since the State has a substantial stake in having its law applied, we believe the district court erred in striking down this provision in Section 12 of the Florida Act."

b. *Terminal facilities.* What we have just said with respect to vessels is all the more applicable to terminal facilities, where the connection with the State is even greater and where there appears to be even less need for uniformity since terminal facilities do not move from state to state as do ships. Nor do damages from terminal facilities to other shore installations fall within the admiralty jurisdiction. See *Rodrigue v. Aetna Casualty Co.*, 395 U.S. 352, 360-361.

" Federal law provides criminal penalties for the discharge of oil by ships in certain instances, but Section 12 of the Florida Act is not inconsistent since it provides a civil remedy. The federal criminal provisions are:

(1). The Oil Pollution of the Sea Act of 1961, as amended, 33 U.S.C. 1001-1015, implementing the 1954 International Convention for the Prevention of the Pollution of the Sea by Oil. The Act prohibits oil discharges by ships in certain territorial zones incident to normal operations, but does not apply to the discharge of oil to prevent damages to the ship or the escape of oil resulting from damage to the ship. 33 U.S.C. 1003. Violations are a misdemeanor and are punishable by a fine not exceeding \$2,500 nor less than \$500. 33 U.S.C. 1005.

(2). The Refuse Act of 1899, 33 U.S.C. 407, which provides that any discharge from a ship of "any refuse matter of any kind or description whatever" into any navigable water of the United States shall be punishable by a fine not exceeding \$2,500 nor less than \$500, or imprisonment not less than thirty days nor more than one year, or both, 33 U.S.C. 411. See *United States v. Standard Oil Co.*, 384 U.S. 224 (the Act applies to oil spills).

3. *Summary.* We conclude, therefore, that Section 12 of the Florida Act is ineffective insofar as it purports to subject ships to unlimited liability contrary to the federal Limitation of Liability Act, but that a state court may interpret Section 12 to be consistent with the federal Act; that Section 12 merely restates existing law insofar as it subjects terminal facilities to unlimited liability and is therefore not invalid in this respect; and that Section 12's imposition of absolute liability on ships and terminal facilities for oil spills is a proper exercise of the State's police power and should be given effect despite the lack of uniformity with general maritime law on this subject that might result. Accordingly, the judgment of the court below, striking down the entire Florida Act primarily because of the alleged unconstitutionality of Section 12, should be reversed."

C. International Conventions Now Pending Before the Senate Would, If Ratified, Significantly Affect the Questions Discussed Above Regarding the Liability of Ships For Damage Caused By Oil Spills

Many, if not all, of the questions discussed above will be significantly affected if pending international Conventions dealing with oil pollution of the seas by

"The Florida Act also contains a provision allowing direct actions against insurers of vessels or terminal facilities, see Section 14(3) (App. 70), which the court below did not separately discuss. In itself, this provision appears to be valid under *Maryland Casualty Co. v. Cushing*, 347 U.S. 409. (The federal Water Quality Improvement Act also contains a direct-action provision that the federal government may invoke to sue the shipowner's insurer for cleanup costs. 33 U.S.C. 1161 (p) (3).)

ships, which the President has transmitted to the Senate,³⁶ are ratified.

The 1969 Convention on Civil Liability establishes rules regarding the liability of oil-carrying vessels to governments and private persons for damages from oil pollution. The shipowner is liable for such damages in all cases unless he can show that the oil spill was caused by (a) an act of God, (b) an act of war, (c) an act done with intent to injure or with negligence by the party suffering damages or a third person, or (d) negligence of a government. Under procedures specified in the Convention, the owner may limit his liability per incident to \$144 per gross registered ton or \$15 million,³⁷ whichever is less, unless the incident occurred as a result of his fault or privity. Ships are required to maintain insurance or other evidence of financial responsibility to cover potential liability under the Convention. In addition to the United States, eighteen other countries had signed the Convention at the time of its transmittal to the Senate.³⁷

³⁶ *Presidential Message Transmitting Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage and Amendments to the 1954 Prevention of Pollution of the Sea by Oil Convention*, Exec. Doc. K, 92d Cong., 2d Sess. (1972) [hereinafter "1971 Convention"]; *Presidential Message Transmitting Two Conventions and Amendments Relating to Pollution of the Sea by Oil*, Exec. Doc. G, 91st Cong., 2d Sess. (1970) [hereinafter "1969 Convention"].

³⁷ See note 38, *infra*.

³⁷ See 1969 Convention, *supra*, Exec. Doc. G, at 4-5.

The 1971 Convention supplements the 1969 Convention on Civil Liability and sets up an international Compensation Fund. If a shipowner has limited his liability under the 1969 Convention, the Fund will pay for additional damages up to an aggregate of \$32.4 million.²⁸ Also, the Fund will pay governments or private persons up to this amount even in cases where the shipowner would have a defense because the damage resulted from an act of God, the act or omission of a third person, or negligent maintenance of navigational aids by a government. Compensation up to this amount is also available where the claimant cannot identify the particular ship from which the oil escaped. The Fund is financed by payments required from receivers of oil importing more than a specified amount per year. In addition to the United States, eleven other countries had signed this Convention at the time of its transmittal to the Senate.²⁹

If ratified, these Conventions will, under the Supremacy Clause, supersede state laws regarding liability for oil spills from ships. However, we are of the view that in the meantime Florida's liability provision is valid to the extent indicated in our previous discussion.

²⁸ Since the Convention sets limits according to a gold standard, these dollar figures take account of the Par Value Modification Act, P.L. 92-268, 92d Cong.

²⁹ 1971 Convention, *supra*, Exec. Doc. K, at VI. We are informed that as of August 1972, a total of 28 countries in addition to the United States had signed or ratified this Convention.

II

FLORIDA MAY NOT IMPOSE REQUIREMENTS WITH RESPECT TO THE EQUIPMENT CARRIED ON SHIPS FOR CONTAINING OIL SPILLS, BUT THE EXTENT OF THE STATE'S REGULATORY AUTHORITY OVER TERMINAL FACILITIES SHOULD NOT BE DECIDED IN THIS CASE

A. Since Uniform Regulations Are Necessary in Regard to the Equipment And Fittings Required On Ships Plying the Navigable Waters of the United States, This Is an Area For Exclusive Federal Regulation And Individual States Cannot Impose Their Own Requirements

Section 7(2)(a) of the Florida Act directs the state Department of Natural Resources to formulate regulations "requiring that vessels transporting pollutants within state waters shall maintain on board such containment gear as may be required by the department with a crew trained in the use of such gear" (App. 62).⁴⁰ In our view, this provision of the state law is invalid under the commerce and admiralty clauses of the Constitution because the subject sought to be regulated—containment equipment on ships—requires uniform, federal regulation. The Court's holding in *Kelly v. Washington*, 302 U.S. 1, 15, is, we believe, controlling on this issue:

If, however, the State goes farther and attempts to impose particular standards as to structure, design, equipment and operation which in the judgment of its authorities may be desirable but

⁴⁰ Section 7(2)(d) of the Act also requires regulations prescribing "Procedures, methods, means, and equipment to be used by persons subject to regulation by this act and to be used in the removal of pollutants" (App. 63).

pass beyond what is plainly essential to safety and seaworthiness [of the ship], the State will encounter the principle that such requirements, if imposed at all, must be through the action of Congress which can establish a uniform rule.

Here, Florida has authorized its Department of Natural Resources to require certain "containment gear" on ships entering and leaving Florida ports. By "containment gear" Florida may mean equipment to contain and prevent the spreading of oil spills that have occurred. But there are numerous kinds of equipment systems in various stages of development for this purpose, including *inter alia* the "dynamic keel" oil containment system,⁴¹ pneumatic barriers using air bubbles,⁴² and various types of "booms."⁴³ And the obvious difficulty is, as the Court pointed out in *Kelly, supra*, 302 U.S. at 15, that Florida "might prescribe standards, designs, equipment and rules of one sort, [Maine] another, [New York] another, and so on."⁴⁴ By "containment gear" Florida may also mean fittings and equipment to

⁴¹ See March, "Dynamic Keel" Oil Containment System, in *Proceedings of Joint Conference on Prevention and Control of Oil Spills* (sponsored by American Petroleum Institute, July 15-17, 1971).

⁴² See Basco, *Pneumatic Barriers for Oil Containment under Wind, Wave and Current Conditions*, in *id.* at 381.

⁴³ See Marks, Geiss and Hirshman, *Theoretical and Experimental Evaluation of Oil Spill Control Devices*, in *id.* at 393.

⁴⁴ By contrast, the Smoke Abatement Code of the City of Detroit upheld in *Huron Cement Co. v. Detroit*, 362 U.S. 440, did not require any particular equipment on ships, but merely provided for the application to ships of standards for maximum allowable smoke emissions in the City.

prevent oil seepages and spills from leaving the ship. Here again diverse equipment regulations for ships from state to state would unreasonably burden maritime commerce.

Thus, even in the absence of federal law on the subject, we believe that, under *Kelly v. Washington, supra*, States cannot impose their own requirements regarding containment equipment on ships.⁴³ We add, however, that the inability of the States to act in this area will not leave the matter unregulated. The federal Water Quality Improvement Act, 33 U.S.C. 1161 (j) (1), authorizes the President to issue regulations "establishing procedures, methods, and requirements for equipment to prevent discharges of oil from vessels and from onshore facilities and offshore facilities," and regulations governing inspection of vessels to reduce the likelihood of discharges of oil. With respect to ships, the Coast Guard has published, pursuant to this authority, extensive and detailed proposed regulations, a sample of which we have set forth in the margin,⁴⁴ dealing with the kind of equip-

⁴³ Florida's regulation of containment gear does not come within the exception in *Kelly* allowing States to inspect ships entering their ports in order to insure safety and seaworthiness, since this exception applies only in regard to vessels that are "actually unsafe and unseaworthy in the primary and commonly understood sense," 302 U.S. at 15, which does not include ships with containment gear different from that required by Florida or without any containment gear on board.

⁴⁴ § 155.310 Cargo oil discharge containment.

(a) After December 31, 1974, no person may operate a tank vessel that is carrying oil that has a tank capacity

for 10,000 U.S. gallons or more of oil unless it has—

(1) Fixed containers or enclosed deck areas that meet the requirements of this section under or around each oil loading manifold and each oil transfer connection area; and

(2) A means of draining or removing discharged oil from each container or enclosed deck area.

(b) Each drain and scupper in an enclosed deck area required by this section must have an attached means of closing.

(c) Each fixed container or enclosed deck area must hold, in all conditions of vessel list or trim, to be encountered during the loading operation at least—

(1) 100 U.S. gallons if it serves one or more 6-inch nominal diameter or smaller hose or loading arm connections;

(2) 150 U.S. gallons if it serves one or more hose or loading arm connections larger than 6 inches, but less than 12 inches, nominal diameter; or

(3) 200 U.S. gallons if it serves one or more 12-inch or larger nominal diameter hose or loading arm connections.

* * * * *

§ 155.320 Fuel oil discharge containment.

After December 31, 1974, no person may transfer oil for fuel to a vessel of 100 gross ton or more unless—

(a) It has a fixed container or enclosed deck area of at least 14 U.S. gallons capacity under or around each fuel tank vent, overflow, and fill pipe; or

(b) Each fuel tank vent, overflow, and fill pipe is located where a portable container that is at least 18 inches deep and has at least 14 U.S. gallons capacity can be placed under it.

* * * * *

§ 155.400 Valves.

After December 31, 1974, no person may operate a vessel of 100 or more gross tons unless—

[Footnote continued on page 34]

ment and fittings ships must carry in order to contain oil and prevent spills. 36 Fed. Reg. 24960."

Further, under recent amendments to 46 U.S.C. 391a, enacted after the decision below, the Coast Guard is authorized, "[i]n order to secure effective provision * * * for protection of the marine environment," to establish regulations for ships⁴⁸ "with respect to equipment and appliances for * * * the prevention and mitigation of damage to the marine en-

⁴⁸ [Continued]

(a) It has a valve in each fixed overboard bilge and ballast discharge line except a line used only for discharges from spaces free from sources of oil;

(b) It has a positive means of closing each valve required by paragraph (a) of this section at the valve if it is accessible and—

(1) On or above the freeboard deck of a vessel that is required to have a freeboard deck under 46 CFR 43.05-1 (g); or

(2) On or above the main deck of a vessel that does not have a freeboard deck;

(c) Each valve required by §§ 155.340, 155.350, 155.370, 155.380, and paragraph (a) of this section has a positive means of being sealed in the closed position; and

(d) Each valve required by §§ 155.340, 155.350, 155.370, 155.380, and paragraph (a) of this section is conspicuously identified by a label on or next to the valve and each remote means of closing the valve.

* * * * *

⁴⁹ The Coast Guard informs us that these regulations are now being reviewed and revised and will be formally issued by the end of 1972.

⁵⁰ The amendments cover ships carrying oil or other liquid pollutants.

vironment * * *." Pub. L. 92-340, Section 201, 92 Cong. (July 10, 1972).⁴⁸

Together these recent amendments and the proposed regulations under the federal WQIA indicate that federal law has so occupied the field that the States are preempted from acting in this area.⁴⁹ But in our view this question need not be resolved since state laws prescribing containment equipment on ships would be invalid even in the absence of federal legislation on the subject.

B. Although Recent Federal Legislation Gives the United States Authority to Regulate the Operations of And Equipment On Terminal Facilities, Congress Recognized the States' Concurrent Authority To Act In This Area And the Extent of Florida's Authority In this Respect Cannot Now Be Appropriately Determined Since Neither the State Nor the Federal Government Has Yet Promulgated Regulations Governing Terminal Facilities

In order to prevent oil spills, the Florida Act also requires regulation of equipment relating to the use and operation of terminal facilities. Section 7(2)(g) (App. 64). In striking down the entire Florida Act, the court below did not specifically discuss Section 7(2)(g). We believe it would be inappropriate for

⁴⁸ The Coast Guard has not yet promulgated regulations under Section 201 of Pub. L. No. 92-340, *supra*.

⁴⁹ The provision in the WQIA preserving state authority and declaring that the Act does not preempt state law "imposing any requirement or liability with respect to" oil spills, see p. 17, *supra*, does not appear to apply to laws regarding the regulation of equipment on ships. See 33 U.S.C. 1161(o) (1) and (2).

this Court now to pass on the constitutionality of this provision since its validity may substantially depend upon how Florida seeks to exercise the regulatory authority conferred therein and upon what regulations are promulgated by the United States Coast Guard under the recently-enacted Ports and Waterways Safety Act of 1972, Pub. L. 92-340, Title I, 92d Cong. (July 10, 1972), and under the Water Quality Improvement Act, 33 U.S.C. 1161(j)(1), see 36 Fed. Reg. 24960.⁵¹

The federal Ports and Waterways Safety Act authorizes the Coast Guard to "prescribe minimum safety equipment requirements for structures subject to this title to assure adequate protection from fire, explosion, natural disasters and other serious accidents or casualties"; the purpose of such requirements is "to protect the navigable waters and the resources therein from environmental harm * * *." *Id.*, Section 101(7).⁵² Pollution of navigable waters from oil spills provided the impetus for this legislation,⁵³ and there is no doubt that the federal Act and the

⁵¹ Present Coast Guard regulations pertaining to "waterfront facilities" are contained in 33 C.F.R. 126.

⁵² The "structures" covered by the federal Act are those "on or in the navigable waters of the United States, or any land structure or shore area immediately adjacent to those waters * * *." *Id.*, Section 101. This appears to be coextensive with coverage under the Florida Act, which defines "terminal facility" as "any waterfront facility of any kind" used for drilling, pumping, or handling oil. Section 3(9) (App. 58-59).

⁵³ See H. Rep. No. 92-563, 92d Cong., 1st Sess., 2-7 (1971).

Florida Act overlap with respect to the regulation of terminal facilities in order to prevent such environmental harm. However, rather than preempting this area, Congress left important regulatory authority with the States. Section 102(b) of the Ports and Waterways Safety Act specifically provides that "Nothing contained in this title * * * prevent[s] a State or political subdivision thereof from prescribing for structures only higher safety equipment requirements or safety standards than those which may be prescribed pursuant to this title."

In addition, pursuant to the Water Quality Improvement Act, 33 U.S.C. 1161(j)(1), the Coast Guard has published proposed regulations dealing with equipment on terminal facilities, 36 Fed. Reg. 24960, 24964-24965. These regulations, which have not yet become final,⁴⁴ require, among other things, that terminal facilities have equipment to prevent oil from spilling onto the water and to contain oil that has spilled, Section 154.530-154.545, 36 Fed. Reg. 24964; that they have adequate means of communication with the vessel in transfer operations, Section 154.560, 36 Fed. Reg. 24964; and that they have certain kinds of hose assemblies, loading arms and closure devices, Sections 154.500-154.520, 36 Fed. Reg. 24964.

The federal Water Quality Improvement Act, like the Ports and Waterways Safety Act of 1972, *supra*, recognizes state regulatory authority with respect to

⁴⁴ The Coast Guard expects the regulations, which are undergoing revision, to be issued in final form before the end of 1972.

terminal facilities and specifically provides that federal permits will not be issued to terminal facility operators or owners unless the applicant first supplies a certificate from the State that his operation will be conducted in accordance with state water quality standards. 33 U.S.C. 1171(b)(1).

Thus, determination of the validity of a State's regulations on this subject would require a specific comparison of them with the pertinent federal regulations. But the latter have not yet been adopted by the Coast Guard and we are informed that Florida has not yet promulgated its regulations under Section 7(2)(g). In addition, this portion of the Florida Act may be interpreted to allow the State to act only in conformity with the federal Ports and Waterways Safety Act and the Water Quality Improvement Act, thus avoiding any federal-state conflict. See pp. 14-15, *supra*. It would therefore be premature at this time to pass upon the specific extent of Florida's authority to regulate in this area ⁵⁵ since, as in *Kelly v. Washington, supra*, 302 U.S. at 16, "[t]hat question cannot be satisfactorily determined on this record and [should] remain for decision as it may be presented

⁵⁵ The federal Ports and Waterways Safety Act, in preserving state authority to require higher safety standards, assumes that the States have preexisting authority to regulate terminal facilities. We believe this assumption to be correct. For the obvious reason that such facilities are stationary, the situation is unlike that with respect to vessels, where the lack of uniform equipment requirements from state to state would be an unreasonable burden on maritime commerce.

in the future in connection with some particular action taken by the state authorities." ⁵⁶

⁵⁶ There may be other areas of potential conflict between the Florida Act and federal law. For example, the Water Quality Improvement Act, 33 U.S.C. 1161(b) (2), exempts discharges of oil in such quantities and places as determined by the President, through regulations, not to be harmful. On the other hand, Section 4 of the Florida Act appears to prohibit all discharges of oil in any quantity upon the State's coastal waters and beaches.

Also, compare Section 7(2) (g) of the Florida Act (authorizing regulations setting minimum weather and sea conditions for permitting a vessel to enter and leave port), with 46 U.S.C. 91 (clearance to leave port); 33 C.F.R. 124 (Coast Guard regulations on control over movement of vessels issued under Exec. Order 10173); and the Ports and Waterways Safety Act of 1972, *supra* (authorizing the Coast Guard to control vessel traffic in order to prevent environmental harm from vessel damage). (Florida has not yet issued regulations under Section 7(2) (g).)

We believe matters such as these should not be resolved now, but should be "left to be determined when the precise question arises" in the future. *Kelly v. Washington*, *supra*, 302 U.S. at 15.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed insofar as it holds that Florida may not validly regulate equipment on ships, but should be reversed in all other respects since the provisions dealing with the extent of liability of ship-owners and the regulation of the equipment operations of terminal facilities may be interpreted to avoid invalidity and since the other provisions we have discussed are valid.

Respectfully submitted.

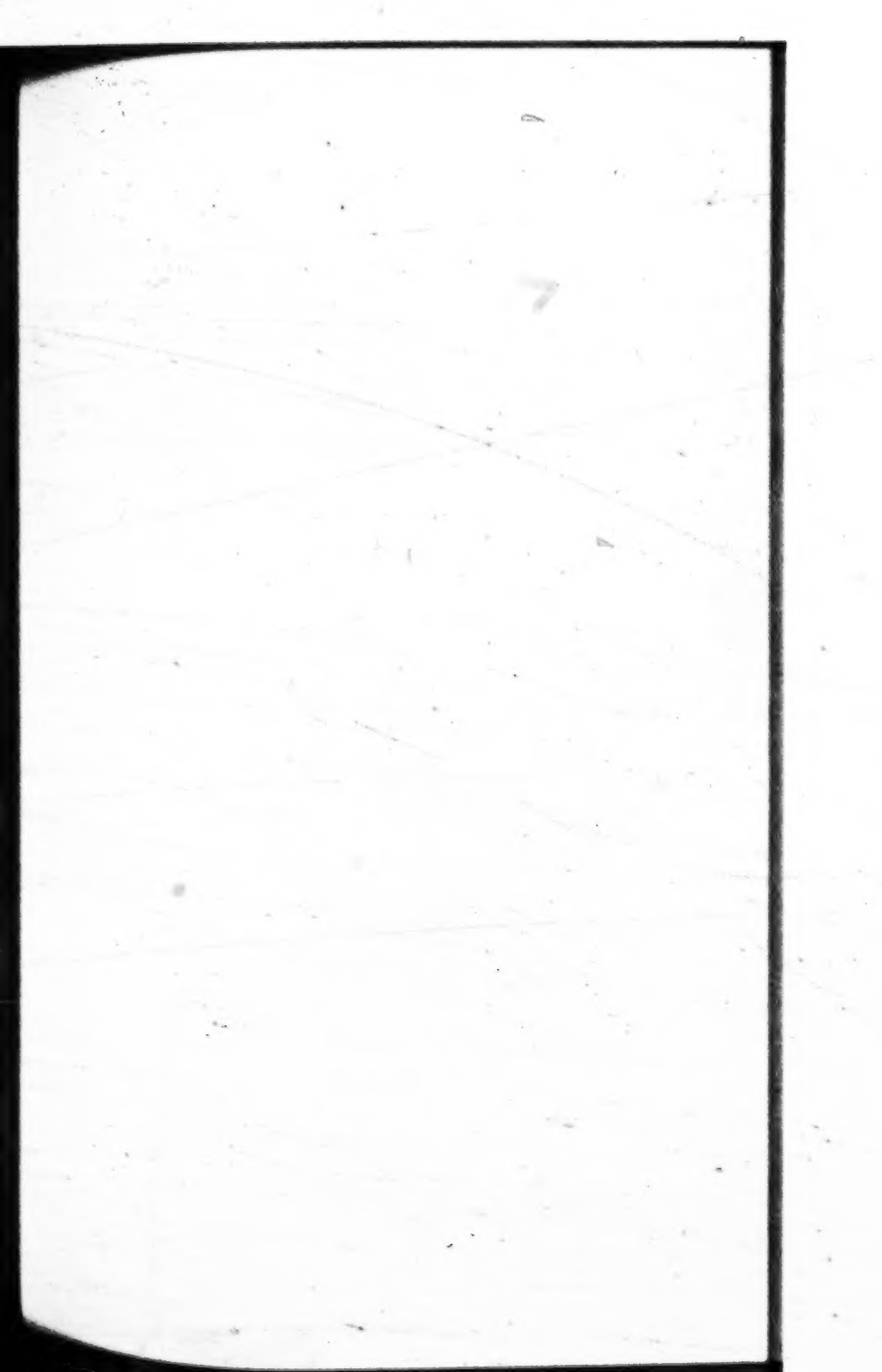
ERWIN N. GRISWOLD,
Solicitor General.

KENT FRIZZELL,
Assistant Attorney General.

HARLINGTON WOOD, JR.,
Assistant Attorney General.

A. RAYMOND RANDOLPH, JR.,
Assistant to the Solicitor General.

SEPTEMBER 1972.



Motion for Leave to File Brief *Amicus Curiae*

The American Bar Association respectfully moves for leave to file the annexed Brief *Amicus Curiae* in support of affirmance, in accordance with Rule 42.

This motion was not made prior to August 15, 1972 (the extended date for the filing of Appellees' briefs), for the following reasons:

The constitutionality of the Act for the Extension of Admiralty Jurisdiction (hereinafter "Admiralty Extension Act"), 46 U.S.C. § 740, adoption of which had been actively supported by the Association, was attacked by Appellants for the first time in their Brief in this Court, filed June 15, 1972. Shortly thereafter, the attack came to the attention of the Association's Standing Committee on Admiralty and Maritime Law, which recommended that the Association move for leave to file a brief *amicus curiae*. However, it was impossible to obtain approval of this course of action until the next regular meeting of the Association's Board of Governors, scheduled to commence August 10, 1972 at San Francisco. At this meeting, after due deliberation, the Board of Governors authorized the present action.

In an effort to avoid moving for leave to file, the consent of counsel for all parties of record was requested by letter. All consented save counsel for Appellants, who gave notice of their refusal by letter dated August 22, 1972. A copy of that letter is annexed.

The American Bar Association, the national association of the legal profession, is composed of more than 157,000 attorneys. Its Standing Committee on Admiralty and Maritime Law is composed of the signatories to the annexed Brief. The Association and its members are vitally interested in the outcome of this appeal because of Appellants' attack upon the constitutionality of the Admiralty Extension

Motion for Leave to File Brief Amicus Curiae

sion Act, 46 U.S.C. § 740, legislation which had been actively supported by the Association for at least 10 years prior to its enactment in 1948, and because of the Association's continuing concern for uniformity in the law.

The Association is in agreement with the position taken herein by Appellees and, as *amicus curiae*, by the Maritime Law Association of the United States, and wishes to file the short brief annexed hereto because only this Association, as the most broadly based national organization of attorneys, is in a position to state the concern of the national bar for the preservation of the uniformity and harmony of the maritime law.

This appeal presents basic and far-reaching questions concerning the legislative powers of the states in the maritime area, and Movant respectfully submits that the filing of the annexed Brief *Amicus Curiae* under Rule 42 would assist in the fullest development of the issues.

Respectfully submitted,

ROBERT G. MCCREARY, JR.
Attorney for Movant,
American Bar Association
1144 Union Commerce Building
Cleveland, Ohio 44115

IN THE
Supreme Court of the United States

October Term, 1972

No. 71-1082

REUBEN O'D. ASKEW, *et al.*,

Appellants,

against

THE AMERICAN WATERWAYS OPERATORS, INC., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF FLORIDA

**BRIEF OF THE AMERICAN BAR ASSOCIATION
AS AMICUS CURIAE,
IN SUPPORT OF AFFIRMANCE**

The American Bar Association ("the Association") respectfully submits this Brief as *amicus curiae* in support of affirmance of the decision of the United States District Court for the Middle District of Florida,¹ declaring the Florida Oil Spill Prevention and Pollution Control Act² unconstitutional and enjoining its enforcement. The Association adopts the statement of the Question Presented contained in the Brief of the Maritime Law Association of the United States, as *amicus curiae* (pp. 1-2).

¹ 335 F.Supp. 1241; A39-55.

² Ch. 70-224, Laws of Florida, 1970; A56-73.

Interest of *Amicus Curiae*

The Association is the national association of the legal profession, with a current membership of more than 157,000 attorneys, and has among its committees a Standing Committee on Admiralty and Maritime Law. The Association has working relationships with numerous governmental agencies, as well as with every state and local bar association throughout the country. The Association acts in cooperation with many other professional and civic organizations in seeking ways to improve the effectiveness of the law, and efficiency and fairness in the administration of justice.³ Thus, it has from time to time recommended improvements in the maritime law and the rules of practice governing admiralty cases, and a number of its recommendations have been adopted by Congress and by this Court.

In 1928, the Association, acting in cooperation with the Maritime Law Association of the United States, advocated legislation remedying the inequities resulting from the then existing case law whereunder the federal district courts, as courts of admiralty, lacked jurisdiction of suits for injuries caused by vessels to persons and property ashore, including bridges, piers and other extensions of the land. See 63 A.B.A. Reports 147, 210 (1938). The Association continued to support such legislation until it was fully adopted in 1948 as the Act for the Extension of Admiralty Jurisdiction⁴ (hereinafter "Admiralty Extension Act"). See 66 A.B.A. Reports 147, 219-20, 412, 418-19 (1941); 68 A.B.A. Reports 150, 189, 195 (1943); 70 A.B.A. Reports 11, 214, 216 (1945), and see 1948 U.S. CODE CONG. SERV., p. 1899.

³ See Jaworski, *The American Bar Association:*

A Quasi-Public Institution, 58 A.B.A.J. 917 (Sept., 1972).

⁴ 46 U.S.C. § 740.

In advocating such national legislation in the maritime field, the Association has consistently supported the principle underlying the Admiralty Clause of the Constitution,⁵ i.e., that maritime commerce depends upon national and international harmony and uniformity in the law for its efficient performance. The decision below accords completely with this principle, and thus with the Admiralty Clause.

The Association, in its endeavors to achieve maximum harmony and uniformity in the laws governing maritime commerce, fully supports Appellees' defense of the Admiralty Clause and its underlying principles.

Argument

The Association is in full accord with the statements made in the Brief of the Maritime Law Association of the United States, as *amicus curiae*, and adopts that Association's statements as its own.

In addition, in view of the Association's advocacy of the Admiralty Extension Act, it is particularly concerned with Appellants' attack on the constitutionality of that legislation. It is submitted that the Admiralty Extension Act is plainly constitutional, for the reasons set forth in the Maritime Law Association's Brief (pp. 11-15).

Even before passage of the Admiralty Extension Act, claims for injuries caused by vessels to persons and property on land, or extensions of the land, were subject to the Limited Liability Act.⁶ *Richardson v. Harmon*, 222 U.S. 96 (1911). The Admiralty Extension Act therefore had no effect on the right of a shipowner to limit his liability under

⁵ CONSTITUTION, ARTICLE III, SECTION 2, CLAUSE 3.

⁶ 46 U.S.C. §§ 183-89.

federal law for shoreside injuries caused by his vessel, without his "privity or knowledge". What the Act accomplished was to bring such injuries within the admiralty jurisdiction and to make them subject to the general maritime law. That law therefore governs such substantive questions as the basis of liability and the effect of contributory fault with respect to claims for damage to shoreside property, as well as for damage consummated on navigable waters.

Since the general maritime law is federal, under the Supremacy Clause,⁷ no state statute or rule of law in conflict with it is valid.

The Brief *Amicus* of the United States, filed September 1, 1972, while conceding that the Florida Act "is, in our view, ineffective (under the Supremacy Clause Article VI of the Constitution) insofar as it purports to subject shipowners to unlimited liability for damages caused by oil discharged from ships" (pp. 12-13), asserts, surprisingly, that it does not necessarily follow "that this portion of the Florida Act should be declared invalid" (p. 14). The Association respectfully urges that in considering the constitutionality of the Florida Act this Court, if it agrees with the position taken by the Appellees, this Association, the Maritime Law Association, and the United States,⁸ should declare *invalid* that which is *ineffective* by reason of the Supremacy Clause of the Constitution.

The Florida legislation, in purporting to impose absolute, as well as unlimited liability for oil pollution damage caused by vessels, directly contravenes the general maritime law, whereunder fault is the basis of liability for

⁷ CONSTITUTION, ARTICLE VI, CLAUSE 2.

⁸ The Commonwealth of Massachusetts, in its Brief *Amicus Curiae* (p. 10), likewise "concedes that a shipowner sued *in personam* for oil pollution damages could limit his liability under [the Limited Liability] Act."

property damage. *The Clara*, 102 U.S. 200 (1880). While it is true that the liability provisions of the Water Quality Improvement Act^{*} govern only liability for United States Government clean-up costs, the statutory exception carved by Congress out of the rule of the general maritime law differs materially from the Florida statute. Under the Water Quality Improvement Act there is no liability if the discharge of oil is caused by one or more of four excepted causes—act of God, act of war, negligence of the Government, or act or omission of a third party—whereas the Florida Act, if held valid, would impose absolute liability for clean-up costs incurred by the State, and for pollution damage suffered by the State or by private parties.

The Association fully agrees with the United States (Brief, p. 19), that "The court below correctly recognized that a vessel's discharge of oil into navigable waters could be considered a maritime tort, even if the injury were consummated on land". But the issue before this Court is not whether liability for water pollution damage caused by vessels should be absolute, or strict, or based on fault. Rather, it is whether state legislation may validly establish the basis of liability. The answer is plainly in the negative. Under the Admiralty Clause of the Constitution, it is a federal, and not a state prerogative, to determine what the basis of liability for maritime torts should be.

Affirmance of the decision below would not in any sense be a retreat from a concern with ecology; on the contrary, it would advance the cause by clarifying that except in areas of purely local concern, it is the responsibility of the Federal Government to deal with maritime matters, including pollution from vessels. Such clarification should expedite the handling of maritime pollution problems and eliminate useless and expensive duplication of effort and shifting of responsibility.

^{*} 33 U.S.C. §§ 1161-75.

The law to be applied in determining liability for maritime torts cannot vary from state to state, but must be in accord with the general maritime law of the United States. *See* Brief of Appellees American Institute of Merchant Shipping, *et al.*, pp. 13-25. The Association has been in the forefront of the movement to encourage adoption of uniform laws by state legislatures in areas wherein the states are supreme. This laborious task is, happily, unnecessary in the case of the maritime law, since the Admiralty Clause not only makes nation-wide uniformity possible but mandatory.

While the interests of Appellees and of course those of the Maritime Law Association are primarily maritime, the American Bar Association's large, nationwide membership represents interests of every conceivable type. The Association is in complete agreement with Appellees and the Maritime Law Association that a constitutionally sound resolution of the question of the relationship between federal and state powers in the maritime field is of the utmost importance. Affirmance of the decision below would accomplish such a resolution by continuing uniform federal control of maritime commerce, while leaving to the individual states control over waters completely within their boundaries and over land-based sources of water pollution.

CONCLUSION

This Honorable Court should affirm the decision below.

Dated: Cleveland, Ohio
September 22, 1972

Respectfully submitted,

ROBERT G. MCCREARY, JR.
*Attorney for The American Bar
Association, Amicus Curiae*

JAMES J. HIGGINS, New York, N. Y.
WARREN A. JACKMAN, Chicago, Ill.
SAM L. LEVINSON, Seattle, Wash.
DAVID R. OWEN, Baltimore, Md.
JOHN C. SHEPHERD, St. Louis, Mo.
BENJAMIN W. YANCEY, New Orleans, La.
of Counsel

TOPICAL INDEX

	Page
Argument	
Point I	
There is no Constitutional authority for maritime jurisdiction of the Federal See shoreward of navigable waters, but if there is, it is not exclusive, but concurrent with state jurisdiction	1 - 11
Point II	
Water pollution is no more a maritime tort than is smashing a pier with a barge. The impetus for both occurs at sea, but their consummation is a matter of dry-land law.	11 - 13
Point III	
If admiralty is extended shoreward to foreclose all but Federal substantive law in context of a massive oil-spill, the limited Liability Act would frustrate recovery of damages to the State and its citizens.	13 - 15
Conclusion	15
	i

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
In re Barracuda Tanker Corp., 281 F. Supp., 228 (S.D.N.Y. 1968), modified 409 F.2d 1013	8
Belfast, The, 74 U.S. (7 Wall.) 624, 636-641 (1868)	4
Berman v. Parker, 348 U.S. 26 (1954)	13
Blackheath, The, 195 U.S. 361 (1904)	2
Cleveland Terminal & Valley R. R. Co. v. Cleveland S.S. Co., 208 U.S. 316 (1908)	2
Crowell v. Benson, 285 U.S. 22, 55 (1931)	4
E. B. Elliott Adv. Co. v. Metropolitan Dade County, 425 F.2d 1141 (5th Cir., 1970) cert. den., 400 U.S. 805	13
Ex Parte Phenix Ins. Co., 118 U.S. 610 (1886)	2
Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1951)	2
Grant Smith-Porter Ship Co. v. Rohde, 259 U.S. 469 (1922)	2
ii.	

<u>Cases</u>	<u>Page</u>
Hamilton, The, 207 U.S. 398 (1907)	8
Johnson v. Chicago & Pacific Elevator, Co., 119 U.S. 388 (1886)	2
Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920)	5
Lottawanna, The, 88 U.S. (21 Walll.) 558, 577, (1874)	4
Martin v. West, 222 U.S. 191 (1911)	2, 3
Plymouth, The, 70 U.S. (3 Walll.) 20 (1865)	2
Richardson v. Harmon, 222 U.S. 96 (1911)	3, 4
Romero v. International Terminal Operating Co., 385 U.S. 354, 404-405 (1959)	7
Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917)	7
Steamboat Thomas Jefferson, The, 23 U.S. (10 Wheat.) 428 (1825)	2
iii.	

<u>Cases</u>	<u>Page</u>
Steamer, St. Lawrence, The, 66 U.S. (1 Black) 523, 527 (1861)	4
State Industrial Commission v. Nordenholt Corp., 259 U.S. 263 (1922)	5
Taylor v. Carryl, 61 U.S. (20 How.) 583, 598 (1857)	7
Thomas Barlum, The, 293 U.S. 21 (1934)	6
Thomas v. Lane, 23 Fed. Cas. 957 (No. 13,902) (C.C.D. Maine, 1813)	7
Thornhill v. State of Alabama, 310 U.S. 88 (1945)	13
Troy, The, 208 U.S. 321 (1908)	2
United States v. Standard Oil Co., 384 U.S. 224 (1966)	11
Victory Carriers Inc. v. Law, 404 U.S. 1064 (1971)	2, 5, 7
Washington v. W. C. Dawson & Co., 264 U.S. 219 (1924)	5
Opinion of Justices, 103 N.H. 268, 169 A.2d 762 iv.	13

Page

United States Constitution

Article III, Section 2, 2,3,6,10

Statutes - Federal

Admiralty Extension Act, 46,
U.S.C., Section 740 4,6,8,10

Judiciary Act of 1789, 1 Stat.
73, as amended 28 U.S.C.,
Section 1333 6,7

Limitation of Liability Act,
46 U.S.C. 183-189 3

Ships Mortgage Act of 1920, 41
Stat. 1003, 46 U.S.C. 951 6

Water Quality Improvement Act
of 1970, 33 U.S.C., Sections
1161-75 12

Statutes - State

Chapter 376, Florida Statutes
(1970) 1,4,12,15

Other

10 Harvard International Law,
J. 316 at p. 321 (1970) 11

Report to the Committee on
Public Works, United States
Senate, 92nd Cong. 2d Ses. Sev.
No. 92-27 (Aug. 1972) 12
v.



BLEED THROUGH POOR COPY

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-1082

REUBIN O'D. ASKEW, et al.,

Appellants,

vs.

THE AMERICAN WATERWAYS
OPERATORS, INC., et al.,

Appellees.

REPLY BRIEF
OF APPELLANTS

I

There is no Constitutional authority for maritime jurisdiction of the Federal Se: shoreward of navigable waters, but if there is, it is not exclusive, but concurrent with state jurisdiction.

In their brief, Appellees and their amici reassert the principal thrust of the District Court opinion: First, that Chapter 376, Florida Statutes (1970) ("The Florida Act") is an expression of substantive maritime law and, second, that as such it trespasses on an exclusive federal domain because matters maritime are constitutionally immune from state action.

Under opinions of this Court, however, torts consummated on other than navigable waters were not maritime in nature, even though the act giving rise to a claim commenced at sea. Thus, if a structure on land, a bridge or a pier, were damaged by a vessel, admiralty courts would not hear the cause. The Plymouth, 70 U.S. (3 Wall.) 20 (1865); Ex Parte Phenix Ins. Co., 118 U.S. 610 (1886); Johnson v. Chicago & Pacific Elevator Co., 119 U.S. 388 (1886); Cleveland Terminal & Valley R.R. Co. v. Cleveland S.S. Co., 208 U.S. 316 (1908); The Troy, 208 U.S. 321 (1908); Martin v. West, 222 U.S. 191 (1911). But see, Mr. Justice Brown's concurrence in The Blackheath, 195 U.S. 361 (1904).

The court's earliest consideration of matters allegedly maritime consistently applied this locality test, first bounded by "ebb and flow of the tide," The Steamboat Thomas Jefferson, 23 U.S. (10 Wheat.) 428 (1825), and subsequently broadened to navigable waters. The Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851). Article III, Section 2, United States Constitution, describes the grant of federal jurisdiction over admiralty within perimeters of that which is substantively maritime. In case of tort, the "historic view of this court" has been that substance is determined by locality. Victory Carriers, Inc. v. Law, 404 U.S. 1064 (1971), Grant Smith-Porter Ship Co. v. Rohde, 259 U.S. 469 (1922).

The traditional admiralty domain in torts having been navigable waters, it is

a denial of that tradition to extend federal maritime jurisdiction (and substantive maritime law) to torts consummated on land. This tradition has been denied twice.

Two weeks before the Court reiterated the locality test of admiralty tort jurisdiction in Martin v. West, 222 U.S. 191 (1911), it decided Richardson v. Harmon, 222 U.S. 96 (1911), where a tort claim arose from a collision between a vessel and a bridge, and a limitation proceeding was upheld despite the admittedly non-maritime nature of the tort.

Both cases involved collision between a vessel and a bridge. Neither of the bridges were deemed to be aids to navigation. Both cases recognized the non-maritime nature of the occurrence. But Harmon was expressly decided on the basis of the 18th Section of the Limitation of Liability Act of 1884, while Martin v. West involved application of a state statute and, presumably, no limitation proceeding. What is important is that both cases recognized that a sea-to-shore tort was non-maritime in nature. It should follow that if a sea-to-shore tort is non-maritime, then it is plainly beyond the purview of Article III, Section 2, United States Constitution. How can it be said, then, that the prescribing of substantive remedies for sea-to-shore torts is exclusively

a Federal prerogative? Traditionally, it is not.¹

Congress ignored this tradition in 1948 when it extended admiralty jurisdiction landward from navigable waters, establishing a beachhead of rules, limitations and defenses peculiar to the law of the sea well within the dry-land dominion of state jurisdiction (See pp. 52-57, Brief of Appellants) thereby rendering admiralty tort jurisdiction amphibious. (62 Stat. 496, 46 U.S.C. §740). This raises two comments:

Firstly, since this Court alone has power to construe the constitutional grant, Congress may neither enlarge nor restrict its jurisdiction. The Steamer St. Lawrence, 66 U.S. (1 Black) 523, 527 (1861). Congress has power to describe what the maritime law shall be, The Lottawanna, 88 U.S. (21 Wall.) 558, 577 (1874), but it must necessarily act within the perimeters of substantive admiralty and maritime jurisdiction established by this Court. The Belfast, 74 U.S. (7 Wall.) 624, 636-641, (1868); Crowell v. Benson, 285 U.S. 22, 55 (1931). In extending maritime jurisdiction beyond established concepts of

1. To the extent, however, that Richardson v. Harmon would authorize limitation proceedings to frustrate recovery under a state act such as Chapter 376, Florida Statutes, the Court is asked to overrule it or appropriately to limit its application.

the "traditional view of this court," Victory Carriers v. Law, 404 U.S. 1064 (1971), Congress exceeded its authority. See the rationale underlying Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920), and Washington v. W.C. Dawson & Co., 264 U.S. 219 (1924), wherein Congress was precluded from authorizing state legislation which extended or limited operation of substantive maritime law involving state workmen's compensation benefits for stevedores working on board ships.

Yet there was no question that states could provide such benefits for the same individuals employed pierside.

If states have power to provide workmen's compensation to longshoremen injured by accidents occurring on the dock, under the theory that the pier is part of the land, and that application of state law on a pier (land) would not conflict with uniform federal maritime law, State Industrial Commission v. Nordenholt Corp., 259 U.S. 263 (1922), it is difficult to conceive of a reason why the shoreline demarcation should be erased in sea-to-shore tort occurrences involving massive oil-spill pollution of state waters. It is submitted that the line between maritime and non-maritime is still valid, and that admiralty is no more offended by the State Act than it would be by state regulation of the speed of vessels in harbor to control and prevent damage to piers (land) and other vessels caused by violent wakes.

Secondly, even if congressional power lies to ignore judicially imposed limits of Article III, Section 2, United States Constitution, so that from June 19, 1948 forward sea-to-shore torts may be heard in admiralty, the Admiralty Extension Act must be recognized for the limits it imposes upon the federal jurisdiction it has created.

There is no indication in the Act that the federal jurisdiction it extends has the nature of an exclusive domain. Yet, had Congress intended such a result it would have been easily accomplished. As an example, the Court's attention is invited to the Ships Mortgage Act of 1920, 41 Stat. 1003, 46 U.S.C. 951, where exclusivity is spelled out in conclusive terms. See, generally, The Thomas Barlum, 293 U.S. 21 (1934). And without a clear statement of exclusive Federal jurisdiction in the Act, it may be assumed that the Judiciary Act, 28 U.S.C. §1333, means what it says.

We are aware of no express repeal or restrictive modification of the Judiciary Act of 1789 (1 Stat. 73, as amended, 28 U.S.C., §1333). Common law remedies are still saved to suitors. Arguably, the common law emphasis of today's Judiciary Act is stronger than it was in 1789. Unless a matter is of admiralty or maritime jurisdiction (and sea-to-shore torts were not), then all other remedies available in all other cases are outside the exclusive original jurisdiction of United States district courts.

If the "saving to suitors" clause of 28 U.S.C. §1333 has any meaning at all, it must follow that state courts have some jurisdiction in cases affecting admiralty or maritime jurisdiction.² Such cases must include (or, perhaps, even be limited to) sea-to-shore torts, where both federal (navigable waters) and state (land) interests are thrown into issue. The locality test, if the traditional view of this Court is relevant in the instant context, would continue a viable basis for determining appropriate jurisdiction and applicable substantive law. Otherwise, concurrent jurisdiction spoken to in Justice Story's opinion in Thomas v. Lane 23 Fed. Cas. 957 (No. 13,902) (C.C.D. Maine, 1813), quoted with approval in Taylor v. Carryl, 61 U.S. (20 How.) 583, 598 (1857), referred to by Justice Brennan dissenting in Romero v. International Terminal Operating Co., 358 U.S. 354, 404-405 (1959), and quoted again in Victory Carriers v. Law, 404 U.S. 1064 (1971), has scant meaning.

The State of Florida submits that concurrent jurisdiction still means that

² "It would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. That this may be done to some extent cannot be denied" Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917).

which Mr. Justice Holmes described in The Hamilton, 207 U.S. 398 (1907). Substantive state law is appropriate to meet exigencies of an age of super tankers (so long as it is not in conflict with federal law) regardless of whether admiralty is extended or not.

Instances are described in briefs of The American Bar Association and the Maritime Law Association of the United States, amici curiae, where extension of admiralty in certain cases would preclude harsh results rendered by operation of state common law tort rules. But what is overlooked in this recitation of "evils the Act was designed to cure" (Brief amicus curiae of the Maritime Law Association, p. 15) is the understandable concern of the state that strict application of admiralty law in the instance of a massive oil-spill in state waters would leave non-maritime interests without a meaningful remedy. In re Barracuda Tanker Corp., 281 F. Supp., 228 (S.D.N.Y., 1968) modified 409 F.2d 1013.

Finally, briefs filed by Appellees, and amici curiae in their behalf, fail to consider legislative history of the Admiralty Extension Act.

Adoption of the bill will not create new causes of action. It merely specifically directs the courts to exercise the admiralty

and maritime jurisdiction of the United States already authorized by the Judiciary Acts. Moreover, there still will remain available the right to a common-law remedy which the Judiciary Acts ... have expressly saved to claimants. * * * (Senate Report No. 1593, June 11, 1948 [To accompany H.R. 238]; House Report No. 1523, March 8, 1948, 80th Cong., 2d Sess., 1948)

It is difficult to reconcile this statement of congressional intent that common-law remedies have been expressly saved to claimants - and by necessary inference that concurrent jurisdiction still exists - with the statement of the American Bar Association in its brief amicus curiae at page 4 that "[s]ince the general maritime law is federal, under the Supremacy Clause, no state statute or rule of law in conflict with it is valid."

This statement presumes that regulation of land - consummated torts is within the purview of "general maritime law." It also presumes that anything generally maritime is exclusively Federal under the Supremacy Clause. It presumes too much. "Saving to suitors" says that it does.

It is submitted that Article III, Section 2, United States Constitution, is a limitation as much as it is a grant of power to the federal judiciary; that the judicial power there granted is limited to jurisdiction over cases of admiralty and maritime jurisdiction; that definitions of what constitutes an "admiralty and maritime" cause of action have been (and should continue to be) developed within perimeters of navigable waters; that Congress has no power to extend the constitutional grant of judicial power beyond limits expressed in Article III, Section 2; and that, therefore, a reliance upon assertions of congressional authority in the Admiralty Extension Act to nullify state attempts to provide a meaningful remedy in the event of massive oil-spill pollution of state waters, must fail.

But even if Congress has authority to extend power of the federal judiciary across the mean high-water mark of navigable waters and into the states, it is submitted that such power cannot be deemed to be exclusive. If admiralty and maritime jurisdiction extends landward at all, it is at best concurrent.

States have prerogatives within their borders, and protection of citizens, property, and the natural resources of its environment are some of them. State legislation seeking to accomplish this purpose cannot be erased for reason of an exclusive federal jurisdiction.

There is no maritime jurisdiction at all shoreward of navigable waters, but if there is, it is concurrent.

II.

Water pollution is no more a maritime tort than is smashing a pier with a barge. The impetus for both occurs at sea, but their consummation is a matter of dry-land law.

The natural environment of the State of Florida is a valuable asset of the people of the state. No one should question that truism. An important aspect of the state's economy depends squarely upon tourist reaction to the environment.

Clean water for drinking and for recreation is a major factor of Florida's salubrious environment. Pollution by oil or other substances has a highly deleterious effect upon waterways of the state. Cf. United States v. Standard Oil Co., 384 U.S. 224 (1966). If 31,000 gallons of crude oil discharged from the grounded tanker P.W. Thirtle off Newport, Rhode Island, could virtually destroy the entire oyster fishery of Narragansett Bay, or destroy the food chain on which are dependent large populations of commercial fishes (see pages 29-30, Brief of Appellants; 10 Harvard International Law, J. 316 at p. 321 [1970]), then it should be clear

that a massive oil-spill in coastal waters of the state would cause serious damage to the state -- even though the slick itself never touched beach or pier.

At pages 7-8 of its brief amicus curiae, the Maritime Law Association describes some of the "bristles" of the Florida Act purportedly conflicting with general maritime law and Federal statutes.

But general maritime law is not controlling in cases of non-maritime torts for reasons set out above, and, as described under Point II in Appellants' brief, the Florida Act is not in conflict with the Federal Water Quality Improvement Act of 1970, 33 U.S.C. §§1161-75, (Appendix pp. 75-90), but is a legitimate response to that Act. Moreover, since the Federal Act only provides for recovery to agencies of the Federal government for clean-up costs, and expressly disclaims pre-emption (§1161 (o)(2), Appendix page 87), it is difficult to follow the oft-repeated argument that the Act creates an irreconcilable conflict with any state legislation regulating oil-spill pollution of state waters. There is no conflict between the Federal and Florida Acts. See, Analysis of the Decision of the Florida District Court in the Case of American Waterways Operators, Inc., et al, v. Askew, Report to the Committee on Public Works, United States Senate, 92nd Congress,

2d Sess. Ser. No. 92-27 (August, 1972).

III.

If admiralty is extended shoreward to foreclose all but Federal substantive law in context of a massive oil-spill, the limited Liability Act would frustrate recovery of damages to the State and its citizens.

In the final analysis, abstract concepts of uniformity in maritime law must give way before a legitimate exercise of the State police power. It is within that power to determine that the community should be beautiful as well as healthy and clear. Berman v. Parker, 348 U.S. 26 (1954). Maintaining physical beauty of the environment is a proper exercise of the police power. E. B. Elliott Adv. Co. v. Metropolitan Dade County, 425 F.2d 1141 (5th Cir. 1970), cert. den., 400 U.S. 805. The state has not only the power, but the duty to take adequate steps to preserve the peace and protect the property of its residents Thornhill v. State of Alabama, 310 U.S. 88 (1945). And there is judicial acknowledgment of the state's necessity to invoke its police power to protect aesthetics crucial to tourism. Opinion of Justices, 103 N.H. 268, 169 A.2d 762. Appellees and their amici curiae would deny or ignore the foregoing police power

authority in a doctrinaire allegiance to the abstraction of uniformity, and an alleged preeminence of Federal prerogatives in cases of massive oil-spill pollution of state territorial waters.

But underlying their vigorous attack on the Florida Act is a fact which cannot be denied: if the Admiralty Extension Act is sufficiently vital to subject sea-to-shore torts to the control of maritime law, then states and their citizens are unlikely candidates for recovery following an oil-spill. If fault liability can be proven at all, the Limited Liability Act would blunt recovery and make a mockery of remedies afforded in admiralty.

Applied in this context, the Limited Liability Act effectively precludes recourse. It permits of a wrong and affirmatively acts to prevent a remedy. It offends the Fifth Amendment right to due process of law before deprivation of property. It is the inescapable result of transplanting maritime roots from their natural element in navigable waters to dry land and demanding that they work equitably, of forcing limitations upon unwilling and unnatural subjects. Admiralty is not amphibious. To insist that it be extended into common law courts would be to compel the transplant of 200 years of respected law and result in no justice.

If uniformity and harmony of maritime law are to continue as respected elements of traditional jurisprudence, then

admiralty must remain at sea.

CONCLUSION

Fears expressed by maritime interests that the Florida Act will unleash an avalanche of conflicting and confusing state regulations upon vessels are simply unfounded. No regulations specifying minimum requirements as to containment gear have yet been issued by the State. Presumably, they would follow Coast Guard requirements. To suggest that the State of Florida would regulate gear requirements unduly restrictive by reasonable Coast Guard standards and that therefore the Florida Act is unconstitutional is to speculate absurdly.

Florida does not aim to fine for non-compliance or to sue for damage. Florida aims to make it more to the interests of ship-owners and charterers to assure more careful and cautious operation of tankers in state waters. The Florida Act is a shield, not a sword. It is a valid expression of the state's police power. It should be sustained. The decision of the District Court should be reversed.

Respectfully submitted,

ROBERT L. SHEVIN
Attorney General

DANIEL S. DEARING
Chief Trial Counsel

Department of Legal Affairs
The Capitol
Tallahassee, Florida 32304

Attorneys for Appellants

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 300 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ASKEW, GOVERNOR OF FLORIDA, ET AL. v.
AMERICAN WATERWAYS OPERATORS,
INC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF FLORIDA

No. 71-1082. Argued November 14, 1972—Decided April 18, 1973

Florida Oil-Spill Prevention and Pollution Control Act, providing for the State's recovery of cleanup costs and imposing strict, no-fault liability on waterfront oil-handling facilities and ships destined for or leaving such facilities for any oil-spill damage to the State or private persons, does not, in the context of this action by shipping interests to enjoin application of the Florida statute, invade a regulatory area pre-empted by the federal Water Quality Improvement Act, which is concerned solely with recovery of actual cleanup costs incurred by the Federal Government, and presupposes a coordinated federal-state effort to deal with coastal oil pollution. Nor is the State's police power over sea-to-shore pollution pre-empted by the Admiralty Extension Act, which does not purport to supply an exclusive remedy in this admiralty-related situation. *Southern Pacific Co. v. Jensen*, 244 U. S. 205, and *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, distinguished. Pp. 3-18.

335 F. Supp. 1241, reversed.

DOUGLAS, J., delivered the opinion for a unanimous Court.

1

THE SUPREME COURT OF THE UNITED STATES

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71-1082

Reubin O'D. Askew et al.,
Appellants,
v.
The American Waterways
Operators, Inc., et al.

On Appeal from the United
States District Court for
the Middle District of
Florida.

[April 18, 1973]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This action was brought by merchant shippers, world shipping associations, members of the Florida coastal barge and towing industry, and owners and operators of oil terminal facilities and heavy industries located in Florida, to enjoin application of the Florida Oil Spill Prevention and Pollution Control Act, L. Fla. 1970, c. 70-244 (hereafter referred to as the Florida Act). Officials responsible for enforcing the Florida Act were named as defendants, but the State of Florida intervened as a party defendant, asserting that her interests were much broader than those of the named defendants. A three-judge court was convened pursuant to 28 U. S. C. § 2281.

The Florida Act imposes strict liability for any damage incurred by the State or private persons as a result of an oil spill in the State's territorial waters from any waterfront facility used for drilling oil or handling the transfer or storage of oil ("terminal facility") and from any ship destined for or leaving such facility. Each owner or operator of a terminal facility or ship subject to the Act must establish evidence of financial re-

sponsibility by insurance or a surety bond.¹ In addition, the Florida Act provides for regulation by the State Department of Natural Resources with respect to containment gear and other equipment which must be maintained by ships and terminal facilities for the prevention of oil spills.

Several months prior to the enactment of the Florida Act, Congress enacted the Water Quality Improvement Act of 1970, 33 U. S. C. § 1161 *et seq.* (hereinafter referred to as the Federal Act). This Act subjects ship owners and terminal facilities to liability without fault up to \$14,000,000 and \$8,000,000, respectively, for cleanup costs incurred by the Federal Government as a result of oil spills. It also authorizes the President to promulgate regulations requiring ships and terminal facilities to maintain equipment for the prevention of oil spills. It is around that Act and the federally protected tenets of maritime law evidenced by *Southern Pacific Co. v. Jensen*, 244 U. S. 205, and its progeny that the controversy turns. The District Court held that the Florida Act is an unconstitutional intrusion into the federal maritime domain. It declared the Florida Act null and void and enjoined its enforcement. 335 F. Supp. 1241.

The case is here on direct appeal. We reverse. We find no constitutional or statutory impediment in permitting Florida, in the present setting of this case, to establish any "requirement or liability" concerning the impact of oil spillages on Florida's interests or concerns. To rule as the District Court has done is to allow federal admiralty jurisdiction to swallow most of the police power of the States over oil-spillage—an insidious form

¹ At the hearing on plaintiffs'-appellees' application for a temporary restraining order, it was indicated that none of the plaintiffs had attempted to comply with the Florida Act. Shippers had threatened to divert their vessels from Florida ports.

of pollution of vast concern to every coastal city or port and to all the estuaries on which the life of the ocean and the lives of the coastal people are greatly dependent.

I

It is clear at the outset that the Federal Act does not preclude but in fact allows state regulation. Section 1161 (o) provides that:

"(1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency *under any provision of law for damages to any publicly-owned or privately-owned property* resulting from a discharge of any oil or from the removal of any such oil.

"(2) Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing *any requirement or liability* with respect to the discharge of oil into any waters within such state.

"(3) Nothing in this section shall be construed . . . to affect any State or local law not in conflict with this section." (Emphasis added.)

According to the Conference Report, "any State would be free to provide requirements and penalties similar to those imposed by this section or *additional requirements and penalties*. These, however, would be separate and independent from those imposed by this section and would be enforced by the States through its courts."² The Florida Act covers a wide range of "pollutants," § 3 (7), and a restricted definition of pollution. § 3 (8). We have here, however, no question concerning any pollutant except oil.

² H. R. Rep. No. 91-940, 91st Cong., 2d Sess., 42.

The Federal Act, to be sure, contains a pervasive system of federal control over discharges of oil "into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone." § 1161 (b)(1). So far as liability is concerned, an owner or operator of a vessel is liable to the United States for actual costs incurred for the removal of oil discharged in violation of § 1161 (b)(2) in an amount "not to exceed \$100 per gross ton of such vessel, or \$14,000,000 whichever is lesser," § 1161 (f)(1), except for discharges caused solely by an act of God, act of war, negligence of the United States or act or omission of another party. With like exceptions the owner or operator of an onshore or offshore facility is liable to the United States for the actual costs incurred by the United States in an amount not to exceed \$8,000,000. § 1161 (f)(2-3). But in each case the owner or operator is liable to the United States for the full amount of the costs where the United States can show that the discharge of oil was "the result of willful negligence or willful misconduct within the privity and knowledge of the owner." Comparable provisions of liability spell out the obligations of "a third party" to the United States for its actual costs incurred for the removal of the oil. § 1161 (g).

So far as vessels are concerned the federal Limitation of Liability Act, 46 U. S. C. §§ 181-189, extends to damages caused by oil spills even where the injury is to the shore. *Richardson v. Harmon*, 222 U. S. 96, 106. That Act limits the liabilities of the owners of vessels to the "value of such vessels and freight pending." 46 U. S. C. § 189.

Section 12 of the Florida Act makes all licensees' of terminal facilities "liable to the state for all costs of

³ Those required to obtain a license are those who operate a terminal facility. § 6 (11). But licenses to terminal facilities include "vessels used to transport oil, petroleum products, their by-products,

cleanup or other damage incurred by the State and for damages resulting from injury to others," it not being necessary for the State to plead or prove negligence.⁴ There is no conflict between § 12 of the Florida Act and § 1161 of the Federal Act when it comes to damages to property interests, for the Federal Act reaches only costs of cleaning up. As respects damages, § 14 of the Florida Act requires evidence of financial responsibility of a terminal facility or vessel—provisions which do not conflict with the Federal Act.

The Solicitor General says that while the Limitation of Liability Act, *so far as vessels are concerned*, would override § 12 of the Florida Act by reason of the Supremacy Clause, the Limitation of Liability Act has no bearing on "facilities" regulated by the Florida Act. Moreover, § 12 has not yet been construed by the Florida courts and it is susceptible of an interpretation *so far as vessels are concerned* which would be in harmony with the Federal Act. Section 12 does not *in terms* provide for unlimited liability.

Moreover, while the Federal Act determines damages measured by the cost to the United States for cleaning up oil pollution, the damages specified in the Florida Act relate in part to the cost to the State of Florida in cleaning up the spillage. Those two sections are harmonious parts of an integrated whole. Section 1161 (c) (2) directs the President to prepare a National Contingency for the containment, dispersal and removal of oil. The plan must provide that federal agencies

and other pollutants between the facility and vessels within state waters." § 6 (4).

⁴ Section 12 also provides that the pilot or the master of any vessel or person in charge of any licensee's terminal facility who fails "to give immediate notification of a discharge to the port manager and the nearest coast guard station" may be imprisoned for not more than two years or fined not more than \$10,000.

"shall" act "in coordination with State and local agencies." Cooperative action with the States is also contemplated by § 1161 (e), which provides that "[i]n addition to any other action taken by a State or local government" the President may, when there is an imminent and substantial threat to the public health or welfare, direct the United States Attorney of the district in question to bring suit to abate the threat. The reason for the provision in § 1161 (o)(2) stating that nothing in § 1161 pre-empts any State "from imposing any requirement or liability with respect to the discharge of oil into any waters within such State" is that the scheme of the Act is one which allows—though it does not require—cooperation of the federal regime with a state regime.

If Florida wants to take the lead in cleaning up oil spillage in her waters, she can use § 12 of the Florida Act and recoup her costs from those who did the damage. Whether the amount of costs she could recover from a wrongdoer are limited to those specified in the Federal Act and whether in turn this new Federal Act removes the pre-existing limitations of liability in the Limitation of Liability Act are questions we need not reach here. Any opinion on them is premature. It is sufficient for this day to hold that there is room for state action in cleaning up the waters of a State and recouping, at least within federal limits so far as vessels are concerned, her costs.

Beyond that is the potential claim under § 12 of the Florida Act for "other damage incurred by the state and for damage resulting from injury to others." The Federal Act in no way touches those areas. A State may have public beaches ruined by oil spills. Shrimp, clam, oyster, and scallop beds may be ruined and the livelihood of

fishermen imperiled.³ The Federal Act takes no cognizance of those claims but only of costs to the Federal Government, if it does the cleaning-up.

³As to the damages of oil spills to ecological factors it was recently said in 10 Harv. Int. L. Journ. 316, 321-323 (1969):

"Some damage to marine life is obvious in the wake of a disaster such as the one which befell the 'Torrey Canyon.' Surface feeding fishes die when they swim into floating oil, and even slight, non-fatal contact may render their flesh inedible. Shellfish, among others, are also vulnerable to oil pollution. When the tanker 'P. W. Thirtle' grounded off Newport, Rhode Island, 31,000 gallons of heavy black oil were discharged from her tank in an effort to refloat the ship; the result of this was the virtual destruction of the entire oyster fishery of Narragansett Bay. The most serious consequences of oil pollution, however, may not be those which are immediately obvious.

"According to Dr. Erwin S. Iversen, a marine biologist:

'The greatest problem may be the toxic effects on the intertidal animals that serve as food for other more important fishes I don't think the effect is merely that of killing large populations of commercial fishes. Worse than that, it interrupts the so-called food chain.'

"There have been few specific studies of the effect that oil accumulation has on this food chain. One study, conducted by Dr. Paul Galtsoff of the United States Fish and Wildlife Service, found that the diatoms on which oysters feed will not grow where there is even a slight trace of oil on the water. The effect of oil on such microscopic marine plant life may be of great importance, because it is estimated that it takes as much as ten pounds of plant matter to produce one pound of fish.

"Large scale oil pollution, such as that which occurred when the 'Torrey Canyon' ran into the Seven Stones Reef, results in huge losses of water birds. Aside from humane and aesthetic considerations, these birds play a vital role in the ecology of the seashore, a role which profoundly affects the fishing industry. The uncertainty as to the actual extent of the damage done to marine life by oil pollution makes it difficult to estimate the economic effect of such damage, but the importance of the fishing industry within the world's economy is not in doubt and is steadily increasing. Between 1958 and 1963, for example, there was a 42% rise in the world catch. Be-

We held in *Skiriotes v. Florida*, 313 U. S. 69, that while Congress had regulated the size of commercial sponges taken in Florida waters, it had not dealt with any diving apparatus that might be used. Florida had such a law and was allowed to enforce it against one of its citizens. Chief Justice Hughes, speaking for the Court, said: "It is also clear that Florida has an interest in the proper maintenance of the sponge fishing and that the statute so far as applied to conduct within the territorial waters of Florida, in the absence of conflicting federal legislation, is within the police power of the State." *Id.*, at 75.

Similarly, in *Manchester v. Massachusetts*, 139 U. S. 240, 266, we stated that if Congress fails to assume control of fisheries in a bay, "the right to control such fisheries must remain with the State which contains such bays."

Florida in her brief accurately states that no remedy under the Federal Act exists for state or private property owners damaged by a massive oil slick such as hit England and France in 1967 in the *Torrey Canyon* disaster. The *Torrey Canyon* carried 880,000 barrels of crude oil.⁶ Today not only is more oil being moved by sea each year but the tankers are much larger.

cause of the increasing importance of seafood protein, future damage to marine life will have progressively greater economic consequences.

"Perhaps the most noticeable damage caused by oil pollution is the fouling of recreational beaches and shorefront property. One-half million tons of oil are washed ashore each year, rendering beaches unfit for swimming and filling the air with unpleasant odors. Besides the annoyance that this causes a vacationing public seeking relief from urban life, economic loss may be considerable. It is estimated, for example, that a serious oil spill off Long Island during the summer months would cost resort and beach operators thirty million dollars. Oil spills also create navigational and fire hazards in harbors, ports and marinas."

⁶ *Ibid.*

"The average tanker used during World War II had a capacity of 16,000 tons, but by 1965 that average had risen to 27,000 tons, and new tankers delivered in 1966 averaged about 76,000 tons. A Japanese company has launched a 276,000 ton tanker, and other Japanese yards have orders for tankers as large as 312,000 tons. More than 60 tankers of 150,000 tons or more are on order throughout the world, tankers of 500,000 to 800,000 tons are on the drawing boards, and those of more than one million tons are thought to be feasible. On the new 1,010 foot British tanker 'Esso Mercia' two officers have been issued bicycles to help patrol the decks of the 166,890 ton vessel.

"The size of the tanker fleet itself is growing at a rate that rivals the growth in average size of new tankers. In 1955 the world tanker fleet numbered about 2,500 vessels. By 1965 it had increased to 3,500, and in 1968 it numbered some 4,300 ships. At the present time nearly one ship out of every five in the world merchant fleet is engaged in transporting oil, and nearly the entire fleet is powered by oil."⁷

Our Coast Guard reports⁸ that while in 1970 there were 3,711 oil spills in our waters, in 1971 there were 8,736. The damage to state interests already caused by oil spills, the increase in the number of oil spills, and the risk of ever-increasing damage by reason of the size of modern tankers underlie the concern of coastal States.

While the Federal Act is concerned only with actual clean-up costs incurred by the Federal Government, the State of Florida is concerned with its own clean-up costs. Hence there need be no collision between the Federal Act

⁷ *Id.*, at 317-318 (footnotes omitted).

⁸ Polluting Incidents In and Around U. S. Waters, Calendar Year 1971, Environmental Protection, Commandant U. S. Coast Guard.

and the Florida Act because, as noted, the Federal Act presupposes a coordinated effort with the States, and any federal limitation of liability runs to "vessels" not to shore "facilities." That is one of the reasons why the Congress decided that the Federal Act does not pre-empt the States from establishing either "any requirement or liability" respecting oil spills.

Moreover, since Congress dealt only with "clean-up" costs, it left the States free to impose "liability" in damages for losses suffered both by the State and by private interests. The Florida Act imposes liability without fault. So far as liability without fault for damages to state and private interests is concerned, the police power has been held adequate for that purpose. State statutes imposing absolute liability on railroads for all property lost through fires caused by sparks emitted from locomotive engines have been sustained. *St. Louis & San Francisco R. Co. v. Mathews*, 165 U. S. 1. The Federal Act, however, while restricted to clean-up costs incurred by the United States, imposes limited liability for those costs and provides certain exceptions, unless willfulness is established. Where liability is imposed by § 1161 (f) to (g), previously summarized, the United States may recover the full amount of the costs where the oil spillage was the result of "willful negligence or willful misconduct." If the coordinated federal plan in actual operation leaves the State of Florida to do the clean-up work, there might be financial burdens imposed greater than would have been imposed had the Federal Government done the clean-up work. But it will be time to resolve any such conflict between federal and state regimes when it arises.

Nor can we say at this point that regulations of the Florida Department of Natural Resources requiring "containment gear" pursuant to § 7 (2)(a) of the Florida

Act would be *per se* invalid because the subject to be regulated requires uniform federal regulation. Cf. *Huron Cement Co. v. Detroit*, 362 U. S. 440. Resolution of this question, as well as the question whether such regulations will conflict with Coast Guard regulations promulgated on December 21, 1972, pursuant to § 1161 (j)(1) of the Federal Act, 37 CFR § 28250, should await a concrete dispute under applicable Florida regulations. Finally, the provision of the Florida Act requiring the licensing of terminal facilities, a traditional state concern, creates no conflict *per se* with federal legislation. Section 1171 (b)(1) of the Federal Act provides that federal permits will not be issued to terminal facility operators or owners unless the applicant first supplies a certificate from the State that his operation "will be conducted in a manner which will not violate applicable water quality standards." And Tit. I, § 102 (b), of the recently enacted Ports and Waterways Safety Act of 1972, Pub. L. 92-340, 86 Stat. 424, provides that the Act does not prevent "a State or political subdivision thereof from prescribing for structures only higher safety equipment requirements or safety standards than those which may be prescribed pursuant to this title."

II

And so, in the absence of federal pre-emption and any fatal conflict between the statutory schemes, the issue comes down to whether a State constitutionally may exercise its police power respecting maritime activities concurrently with the Federal Government.

The main barrier found by the District Court to the Florida Act are *Southern Pacific Co. v. Jensen*, 244 U. S. 205, and its progeny. *Jensen* held a maritime worker on a vessel in navigable waters could not constitutionally receive an award under New York's workmen's compensation law, because the remedy in admiralty was

exclusive. Later in *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, after Congress expressly allowed the States in such cases to grant a remedy, the Court held that Congress had no such power.

But those decisions have been limited by subsequent holdings of this Court. As stated by Mr. Justice Frankfurter in *Romero v. International Terminal Co.*, 358 U. S. 354, 373, *Jensen* and its progeny mark isolated instances where "state law must yield to the needs of a uniform federal maritime law when the Court finds inroads on a harmonious system." Justice Frankfurter added, however: "But this limitation still leaves the State a wide scope. State-created liens are enforced in admiralty. State remedies for wrongful death and state statutes providing for the survival of actions, both historically absent from the relief offered by the admiralty, have been upheld when applied to maritime causes of action. Federal courts have enforced these statutes. State rules for the partition and sale of ships, state laws governing the specific performance of arbitration agreements, state laws regulating the effect of a breach of warranty under contracts of maritime insurance—all these laws and others have been accepted as rules of decision in admiralty cases, even, at times, when they conflicted with a rule of maritime law which did not require conformity." *Id.*, at 373-374.

Moreover, in *Just v. Chambers*, 312 U. S. 383, we gave our approval to *The City of Norwalk*, 55 F. 98, written by Judge Addison Brown, holding that a State may modify or supplement maritime law even by creating a liability which a court of admiralty would recognize and enforce, provided the state action is not hostile "to the characteristic features of the maritime law or inconsistent with federal legislation," 312 U. S., at 388. Chief Justice Hughes after citing *Steamboat Co. v. Chase*, 16 Wall. 522, and *Sherlock v. Alling*, 93 U. S. 99, went on

to hold that, while no suit for wrongful death would lie in the federal courts under general maritime law, state statutes giving damages in such cases were valid. He said, "The grounds of objection to the admiralty jurisdiction in enforcing liability for wrongful death were similar to those urged here; that is, that the Constitution presupposes a body of maritime law, that this law, as a matter of interstate and international concern, requires harmony in its administration and cannot be subject to defeat or impairment by the diverse legislation of the States, and hence that Congress alone can make any needed changes in the general rules of the maritime law. But these contentions proved unavailing and the principle was maintained that a State, in the exercise of its police power, may establish rules applicable on land and water within its limits, even though these rules incidentally affect maritime affairs, provided that the state action 'does not contravene any acts of Congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its international and interstate relations. It was decided that the state legislation encountered none of these objections. The many instances in which state action had created new rights, recognized and enforced in admiralty, were set forth in *The City of Norwalk*, and reference was also made to the numerous local regulations under state authority concerning the navigation of rivers and harbors. There was the further pertinent observation that the maritime law was not a complete and perfect system and that in all maritime countries there is a considerable body of municipal law that underlies the maritime law as the basis of its administration. These views find abundant support in the history of the maritime law and in the decisions of this Court." 312 U. S. 389-390.

Chief Justice Hughes added that our decisions as of 1941, the date of *Just v. Chambers*, gave broad "recognition of the authority of the States to create rights and liabilities with respect to conduct within their borders, when the state action does not run counter to federal laws or the essential features of an exclusive federal jurisdiction." *Id.*, at 391.

Historically, damages to the shore or to shore facilities were not cognizable in admiralty. See, e. g., *The Plymouth*, 3 Wall. 20; *Martin v. West*, 222 U. S. 191. Justice Story wrote in 1834, "In regard to torts I have always understood that the jurisdiction of the Admiralty is exclusively dependent upon the locality of the act. The Admiralty has not, and never [I believe] deliberately claimed to have any jurisdiction over torts, except such as are maritime torts, that is, such as are committed on the high seas, or on waters within the ebb and flow of the tide." * *Thomas v. Lane*, 2 Sumn. 1, 9.

On June 19, 1948, Congress enacted the Admiralty Extension Act, 46 U. S. C. § 740.¹⁰ The Court considered the Act in *Victory Carriers, Inc. v. Law*, 404 U. S. 202. In that case the Court held that the Admiralty Extension Act did not apply to a longshoremen performing loading and unloading services on the dock. The longshoreman was relegated to his remedy under the state workmen's compensation law. *Id.*, at 215. The Court said, "At least in the absence of explicit congressional authoriza-

* A statement we recently quoted with approval in *Executive Jet Aviation, Inc. v. City of Cleveland*, — U. S. —, —, and *Victory Carriers, Inc. v. Law*, 404 U. S. 202, 205.

¹⁰ It provides in relevant part: "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."

tion, we shall not extend the historic boundaries of the maritime law." *Id.*, at 214.¹¹

The Admiralty Extension Act has survived constitutional attack in the lower federal courts¹² and was applied without question by this Court in *Gutierrez v. Waterman S. S. Corp.*, 373 U. S. 206 (1963). The Court recognized in *Victory Carriers*, however, that the Act may "intrude on an area that has heretofore been reserved for state law." *Id.*, at 212. It cautioned that under these circumstances, "we should proceed with caution in construing constitutional and statutory provisions dealing with the jurisdiction of the federal courts." *Ibid.* While Congress has extended admiralty jurisdiction beyond the boundaries contemplated by the Framers, it hardly follows from the constitutionality of that extension that we must sanctify the federal courts with exclusive jurisdiction to the exclusion of powers traditionally within the competence of the States. One can read the history of the Admiralty Extension Act without finding any clear indication that Congress intended that sea-to-shore injuries be exclusively triable in the federal courts.¹³

Even though Congress has acted in the admiralty area, state regulation is permissible, absent a clear conflict with the federal law. Thus in *Kelly v. Washington*, 302 U. S. 1, it appeared that, while Congress had provided a com-

¹¹ The Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 901 *et seq.*, recently was amended to cover employees working on shoreside areas customarily used by an employer in loading, unloading, repairing or building a vessel. Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, § 2, 86 Stat. 1251.

¹² See *Victory Carriers*, 404 U. S. 209 n. 9.

¹³ See H. R. Rep. No. 1523, 80th Cong., 2d Sess.; S. Rep. No. 1593, 80th Cong., 2d Sess.

prehensive system of inspection of vessels on the navigable water, *id.*, at 4, the State of Washington also had a comprehensive code of inspection. Some of those state standards conflicted with the federal requirements, *id.*, at 14-15; but those provisions of the Washington law relating to safety and seaworthiness were not in conflict with the federal law. So the question was whether the absence of congressional action and the need for uniformity of regulation barred state action. Chief Justice Hughes, writing for the Court, ruled in the negative, saying:

"A vessel which is actually unsafe and unseaworthy in the primary and commonly understood sense is not within the protection of that principle. The State may treat it as it may treat a diseased animal or unwholesome food. In such a matter, the State may protect its people without waiting for federal action providing the state action does not come into conflict with federal rules. If, however, the State goes farther and attempts to impose particular standards as to structure, design, equipment and operation which in the judgment of its authorities may be desirable but pass beyond what is plainly essential to safety and seaworthiness, the State will encounter the principle that such requirements, if imposed at all, must be through the Action of Congress which can establish a uniform rule. Whether the State in a particular matter goes too far must be left to be determined when the precise question arises." *Id.*, at 15.

That decision was rendered before the Admiralty Extension Act was passed.

Huron Cement Co. v. Detroit, *supra*, however, arose after that Act became effective. Ships cruising navigable waters and inspected and licensed under fed-

eral acts were charged with violating Detroit's Smoke Abatement Code. The company and its agents were indeed criminally charged with violating that Code. The Court in sustaining the state prosecution said:

"The ordinance was enacted for the manifest purpose of promoting the health and welfare of the city's inhabitants. Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power. In the exercise of that power, the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government." 362 U. S., at 442.

The Court reasoned that there was room for local control since federal inspection was "limited to affording protection from the perils of maritime navigation," while the Detroit ordinance was aimed at "the elimination of air pollution to protect the health and enhance the cleanliness of the local community." *Id.*, at 445. The Court, in reviewing prior decisions, noted that a federally licensed vessel was not exempt (1) "from local pilotage laws"; (2) "local quarantine laws"; (3) "local safety inspections"; or (4) "local regulations of wharves and docks." *Id.*, at 447.

It follows *a fortiori* that sea-to-shore pollution—historically within the reach of the police power of the State—is not silently taken away from the States by the Admiralty Extension Act, which does not purport to supply the exclusive remedy.

As discussed above, we cannot say with certainty at this stage that the Florida Act conflicts with any federal act. We have only the question whether the waiver

of pre-emption by Congress in § 1161 (o)(2) concerning the imposition by a State of "any requirement or liability" is valid.

It is valid unless the rule of *Jensen* and *Knickerbocker Ice* is to engulf everything that Congress chose to call "admiralty," pre-empting state action. *Jensen* and *Knickerbocker Ice* have been confined to their facts, viz. to suits relating to the relationship of vessels, plying the high seas and our navigable waters, to their crews. The fact that a whole system of liabilities was established on the basis of those two cases, led us years ago to establish the "twilight zone" where state regulation was permissible. See *Davis v. Department of Labor*, 317 U. S. 249, 252-253. Where there was a hearing by a federal agency and a conclusion by that agency that the case fell within the federal jurisdiction, we made its findings final. *Ibid.* Where there were no such findings, we presumed state law, in terms applicable, was constitutional. *Id.*, at 257-258. That is the way the "twilight zone" has been defined.

Jensen thus has vitality left. But we decline to move the *Jensen* line of cases shoreward to oust state law from situations involving shoreside injuries by ships on navigable waters. The Admiralty Extension Act does not pre-empt state law in those situations. See *Nacirema Operating Co. v. Johnson*, 398 U. S. 212.

The judgment below is

Reversed.

TH
ON AP

PETTI
WAYS
MERC

JOSEPH
JOHN B
STEWART
Attor
The
Op

LEROY C
ERVIN,
ROGERS,
JONES
Of

FILE COPY

Supreme Court, U. S.
FILED

MAY 10 1973

NICHOLAS BOGAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1082

REUBIN O'D. ASKEW, et al.,

Appellants,

vs.

**THE AMERICAN WATERWAYS OPERATORS,
INC., et al.,**

Appellees,

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF FLORIDA**

**PETITION OF APPELLEES THE AMERICAN WATER-
WAYS OPERATORS, INC., AMERICAN INSTITUTE OF
MERCHANT SHIPPING, ASSURANCEFORENINGEN
GARD, et al., FOR REHEARING**

**JOSEPH C. JACOBS
JOHN B. CHANDLER, JR.
STEWART D. ALLEN**
*Attorneys for Appellees,
The American Waterways
Operators, Inc., et al.*

**NICHOLAS J. HEALY
GORDON W. PAULSEN**
*Attorneys for Appellees,
American Institute of Merchant
Shipping, Assuranceforeningen
Gard, et al.*

**LEROY COLLINS
ERVIN, VARN, JACOBS & ODOM
ROGERS, TOWERS, BAILEY,
JONES & GAY**
Of Counsel

**HAIGHT, GARDNER, POOR &
HAVENS
HEALY & BAILLIE
FOWLER, WHITE, GILLEN,
HUMKEY, KINNEY AND
BOGGS, P.A.
DEWEY R. VILLAREAL, JR.
RAYMOND A. CONNELL
EMIL A. KRATOVIL, JR.**
Of Counsel

COPY BOUND TOO CLOSE IN CENTER

SUBJECT INDEX

	PAGE
I New Federal legislation enacted since all of the briefs herein were filed makes it clear that Congress has in fact preempted the area of financial responsibility to pay state-incurred clean-up costs; the provisions of Section 14 of the Florida Act re- quiring vessels to furnish special insurance or other evidence of financial responsibility should therefore be declared invalid as a wholly unneces- sary and intolerable burden on interstate and for- eign, as well as on intrastate commerce by water.	2
II The slip opinion appears to vitiate the reforms sought to be accomplished by the Admiralty Ex- tension Act; it should therefore be modified so as to require application of Federal maritime law to the determination of the basis of liability for ship- to-shore damage, whether the claim is heard by a State or a Federal court	13
Conclusion	18
Appendix A	1a
Appendix B	6a
CASES	
C. J. Hendry v. Moore, 318 U.S. 133 (1943)	7
Continental Oil Co. v. London Steamship Own. Mut. Ins. Ass'n., 417 F.2d 1030 (1969)	19
Globus v. Law Research Service, Inc., 418 F. 2d 1276, 1288 (2d Cir. 1969), cert. den. 397 U.S. 913 (1970)	7
Just v. Chambers, 312 U.S. 383 (1941)	16
Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 ...	17,19
Moragne v. States Marine Lines, 398 U.S. 375	15

Northern States Power Company v. State of Minnesota, 447 F.2d 1143 (8th Cir. 1971), <i>aff'd</i> . 405 U.S. 1035 (1972)	10
Parks v. Simpson Timber Co., unreported per curiam opinion of June 12, 1967 reversing judgment amended, and case ordered remanded for consideration of further issues below, 389 U.S. 909 388 U.S. 459 (1967)	20
Pope & Talbot v. Hawn, 346 U.S. 406 (1953)	16
Southern Pacific v. Jensen, 244 U.S. 205 (1917)	17,19
State Dept. v. S.S. Bournemouth, 307 F. Supp. 922, 318 F. Supp. 839, 10 A.L.R. Fed. 950, 956 (C.D. Calif. 1969, 1970)	4
Union Trust Co. v. Eastern Airlines, cert. den. 350 U.S. 907 (1955); reopened and remanded, 350 U.S. 962 (1956)	20
Victory Carriers v. Law, 404 U.S. 202 (1971)	14

FEDERAL STATUTES

28 U.S.C.	
§ 1333(1)	14,15
33 U.S.C.A.	
§§ 1251-1376 (the Water Quality Improvement Act of 1970, P.L. 91-224, 84 STAT. 91, as amended by Federal Water Pollution Control Act Amendments of 1972, P.L. 92-500, 86 STAT. 816)	2,3,4,5,6,8,9,10,12
46 U.S.C.	
§ 740 (Admiralty Extension Act)	7,13,14,16
§ 761 <i>et seq.</i> (Death on the High Seas Act)	15

STATE STATUTES

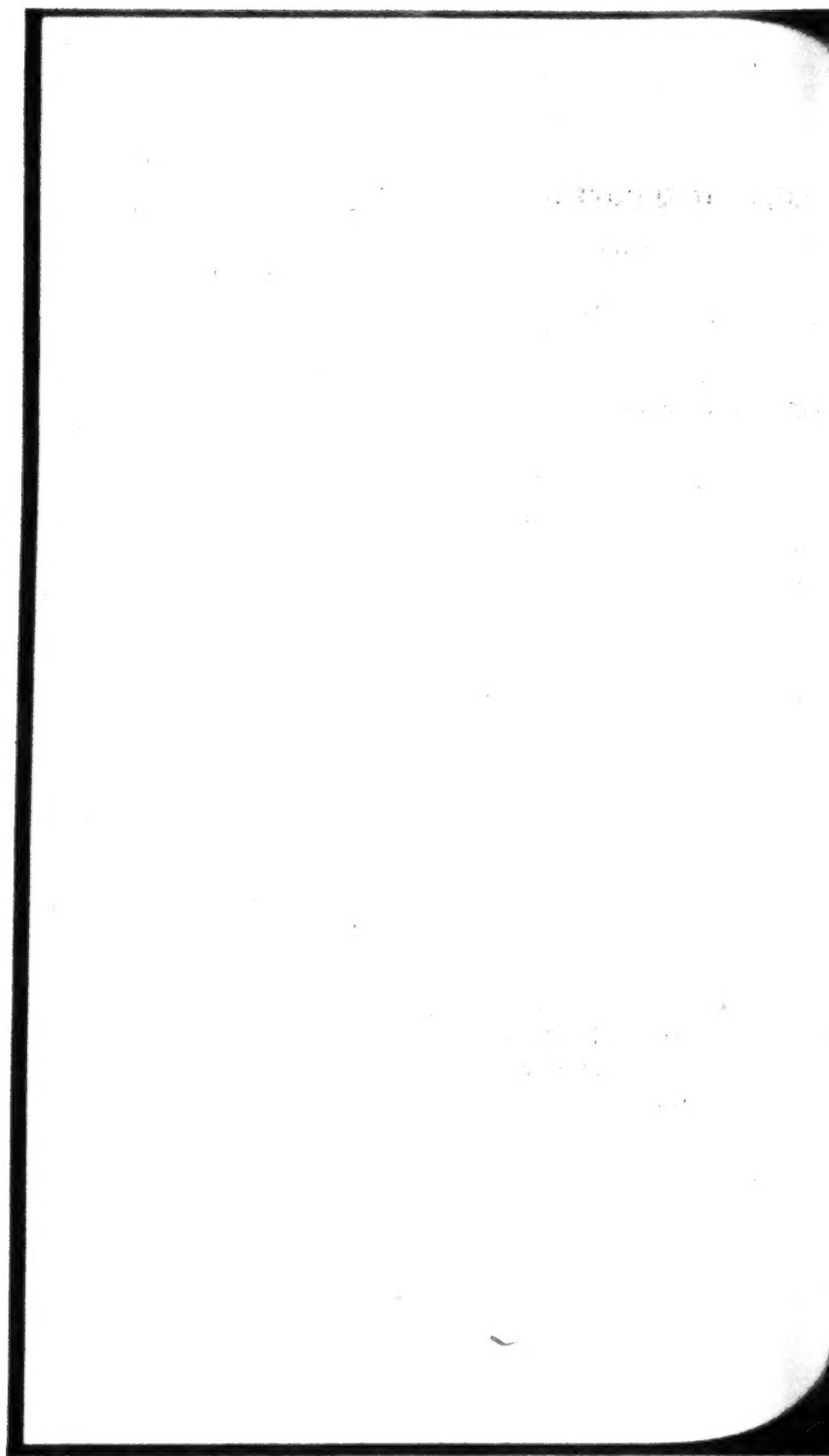
Florida Statutes, § 376 (1970)	2,3,6,7,10,12,16,19
--------------------------------------	---------------------

CONGRESSIONAL AND EXECUTIVE MATERIALS

Executive G, 91st Cong., 2nd Sess.	18
Executive K, 92nd Cong., 2nd Sess.	18
37 Fed. Reg. 28208	5
Senate Report No. 91-351, Committee on Public Works	8,10
Senate Report No. 92-1236, Committee of Conference	5

TREATISES AND LAW REVIEWS

44 C.J.S. 1005-6 (1945)	7
Gilmore & Black, The Law of Admiralty § 7-17	14
Smith, W.J., Financial Responsibility Under The Water Quality Improvement Act, 9 Houst. L. Rev. 657 (1972)	11



IN THE
Supreme Court of the United States

October Term, 1972

No. 71-1082

REUBIN O'D. ASKEW, et al.

Appellants,

vs.

THE AMERICAN WATERWAYS OPERATORS, INC., et al.,

Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE MIDDLE DISTRICT OF FLORIDA

Petition for Rehearing

Now COME Appellees American Waterways Operators, Inc.; Gulf Atlantic Towing Corporation, Glidden-Durkee, a division of SCM, Corporation, Dixie Carriers Inc., Oil Transport Company, Incorporated, National Marine Service Inc., The Revilo Corporation, Eastern Seaboard Petroleum Company, Inc., Nilo Barge Line, Inc., Steuart Transportation Company, Interstate Oil Transport Company, Federal Barge Lines, Inc., Gulf Canal Lines, Inc., Ingram Ocean System Inc., American Institute of Merchant Shipping, Assuranceforeningen Gard, Assuranceforeningen Skuld, The Britannia Steam Ship Insurance Association, Limited, The Japan Ship Owners Mutual Protecting and Indemnity Association, The Liverpool and London Steam Ship Protection and Indemnity Association, Limited, The

London Steamship Owners' Mutual Insurance Association, Limited, Newcastle Protection and Indemnity Association, The North of England Protecting & Indemnity Association Limited, The Standard Steamship Owners' Protection and Indemnity Association Limited, The Standard Steamship Owners' Protection & Indemnity Association (Bermuda) Limited, The Steamship Mutual Underwriting Association, Limited, Sunderland Steamship Protecting & Indemnity Association, Sveriges Angfartygs Assurans Forening, The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited, The West of England Ship Owners Mutual Protection and Indemnity Association (Luxembourg), and their respective members, who respectfully pray that this Honorable Court grant rehearing of this cause.

I

New Federal legislation enacted since all of the briefs herein were filed makes it clear that Congress has in fact preempted the area of financial responsibility to pay state-incurred clean-up costs; the provisions of Section 14 of the Florida Act requiring vessels to furnish special insurance or other evidence of financial responsibility should therefore be declared invalid as a wholly unnecessary and intolerable burden on interstate and foreign, as well as on intrastate commerce by water.

The holding of the slip opinion in 71-1082 that Florida may, without conflict with "the Federal Act",* require evidence of financial responsibility of vessels "[a]s respects damages" resulting from an oil spill** should, we submit, be reconsidered because (1) the legislative history of the Federal Act reveals that Congress did *not* intend states to

* The Water Quality Improvement Act of 1970, P.L. 91-224, 84 Stat. 91, as amended by Federal Water Pollution Control Act Amendments of 1972, P.L. 92-500, 86 Stat. 816, 33 U.S.C.A. §§1251-1376. The 1972 Amendments have not as yet appeared in the official U.S. Code.

** Slip Opinion, 71-1082, at p. 5.

have this power, and effectively preempted the field with respect thereto; (2) the 1972 Amendments* to the Federal Act not only confirm this fact, but make the furnishing of such evidence to each separate state unnecessary; and (3) if each separate state is empowered to require its individual and separate proof of financial responsibility in addition to that which vessel owners have already furnished to the Federal Government, an intolerable burden, as undesirable as it is unnecessary, will be placed on maritime commerce. This is not the only commercial difficulty which the slip opinion poses,** but it is the most immediate and pressing, and can—and should—be resolved in the present setting of this case.

Although the slip opinion is silent with respect to that portion of Section 14 of the Florida Act requiring evidence of financial responsibility insofar as *clean-up costs* are concerned, it is being interpreted by Florida officials as authorizing them to demand evidence of financial responsibility for *all* of the obligations imposed by the Florida Act.*** These requirements triggered the initial request for a temporary restraining order in this matter, granted by the Court below in 1971; renewal of these demands causes the problem now. Whether the requirement of evidence of financial responsibility be limited to pollution damages, or broadened to cover both damages and clean-up costs, the burden is equally intolerable. As will be discussed herein, the Federal Rules of Civil Procedure already

* P.L. 92-500; 86 Stat. 816, 33 U.S.C.A. §§1251-1376.

** See editorial in Journal of Commerce, May 2, 1973, ~~pages~~ Appendix A hereto.

*** Attached hereto as Appendix B are copies of a letter dated April 20, 1973 from the Director of the Division of Marine Resources, Florida Department of Natural Resources, to "All Vessel and Terminal Owners and Operators", with attachments consisting of forms titled "Application for Certificate of Responsibility", promulgated initially in March, 1971, and now reissued without change.

provide for security for damage claims in Admiralty,* and the enactment of new federal legislation has rendered the requirement of insurance or other evidence of financial responsibility to pay state incurred clean-up costs wholly unnecessary. Further, the legislative history of the Federal Act shows that its financial responsibility requirements are for the maximum amounts which could be insured. Congress thus preempted the field in this respect because it did not intend that states could impose any additional requirements, or bar from their waters a vessel which, having satisfied the Federal financial responsibility provisions, found it impossible to satisfy additional state requirements.

On October 18, 1972, (after all of the briefs had been submitted to the Court in this case), Congress enacted the Water Pollution Prevention and Control Act Amendments of 1972.** Insofar as water pollution by vessels is concerned, the principal change effected by the Amendments was the extension of the provisions of the 1970 Water Quality Improvement Act (W.Q.I.A.) *** to other hazardous substances in addition to oil.**** The Amendments require that the National Contingency Plan originally set up on August 20, 1971, pursuant to W.Q.I.A. to deal with the removal of oil, must also provide for the removal of hazardous substances from the navigable waters of the United States, their adjoining shorelines, and the waters of the

*Fed. R. Civ. P., Supplemental Rules for Certain Admiralty and Maritime Claims, Rules B, C and E. See *State Dept. v. S.S. Bournemouth*, 307 F. Supp. 922, 318 F. Supp. 839, 10 A.L.R. Fed. 950, 956 (C.D. Calif. 1969, 1970), which recognized that California had a maritime lien to secure payment of its oil spill clean-up costs.

** P.L. 92-500; 86 STAT. 816; 33 U.S.C.A. §§1251-1376.

*** P.L. 91-224, 84 STAT. 91.

**** Compare Sec. 11(b)(1) of WQIA: "... no discharges of oil into or upon ..." with Sec. 311(b)(1) of the 1972 Amendments: "... no discharges of oil or hazardous substances into or upon ..." And note new Sec. 311(a)(14) and Sec. 311(B) of the 1972 Amendments. 33 U.S.C.A. §§1321(b)(1), (a)(14) and (B).

contiguous zone.* The 1972 Amendments further *require*, for the first time, that this plan** "*shall*" include:

"(H) a system whereby the State or States affected by a discharge of oil or hazardous substance may act where necessary to remove such discharge and such State or States may be reimbursed from the fund established under subsection (k) of this section for the reasonable costs incurred in such removal."***

The Senate Report (No. 92-1236, Committee of Conference) submitted by Senator Muskie made it clear that the intent of Subparagraph (H) was to encourage states to act within the framework of the National Contingency Plan, and to assure the states that they would be reimbursed for their efforts. The Report states:

"Subsection (c) (2), which requires a 'National Contingency Plan', is amended as proposed in the Senate bill to require that plan to include a system whereby the State or States affected by a discharge of oil or hazardous substance may act to remove the discharge and thereafter be reimbursed for reasonable costs." (p. 134)

Subsection (k)**** of Section 311, which was part of the 1970 Federal Act, authorized the appropriation of a \$35 million revolving fund to carry out the provisions of Sub-

* 86 Stat. 865, §311 (c) (2); 33 U.S.C.A. §1321 (c) (2).

** On December 18, 1972, after this cause had been argued, interim regulations setting up a system for reimbursement of State-incurred clean-up costs were published by the Council on Environmental Quality. 37 Fed. Reg. 28208.

*** 86 Stat. 865, §311(c)(2)(H); 33 U.S.C.A. §1321(c)(2)(H).

**** 86 Stat. 865, §311(k); 33 U.S.C.A. §1321(k).

sections (c), (d), (i) and (1),* the fund being replenished by payments made to the United States by owners and operators found liable under the Federal Act.**

It is thus plain that if Florida—or any other state—incurs clean-up expenses, in addition to those incurred by the vessel owner or operator, or the United States Government, or both, the State will be entitled under the 1972 Amendments to reimbursement by the Federal Government from the revolving fund. Any amount so reimbursed to the State will then become “a cost incurred by the United States Government” for which the Government will, in turn, be entitled to reimbursement from the vessel owner or operator in accordance with the provisions of the Federal Act.

It follows that in respect of clean-up costs, the State no longer has any possible reason to require from vessel owners evidence of insurance, a surety bond, qualification as a self-insurer, or “other evidence of financial responsibility satisfactory to the Department of Natural Resources,” as Section 14 of the Florida Act requires.

Section 14 of the Florida Act also requires insurance or other evidence in respect of State claims for civil penalties imposed by the Act. Insurance against liability for penalties for a person's own violations of law may be invalid as

* Subsection (c) authorizes the President to remove a discharge unless he determines that it will be done properly by the owner or operator, and provides for the National Contingency Plan previously discussed. Subsection (d) provides for coordination of all public and private clean-up and preventive efforts and for the summary removal and, if necessary, destruction of the vessel. Subsection (i) entitles a vessel owner or operator who removes a discharge of oil or other hazardous substance to reimbursement by the Government if he can establish one of the four defenses to absolute liability. Subsection (1) concerns delegation of the administration of the Section to the appropriate federal agencies.

** It is understood that \$20 million has been appropriated to the fund.

against public policy.* It would thus be impossible to comply with this requirement, which would effectively bar vessels from trading to Florida even though they had satisfied the Federal requirements for financial responsibility, which, properly, do *not* require proof of financial responsibility to pay the penalties the Federal Act imposes. In any event, if a vessel owner or operator violated the Florida Act, his vessel would be subject to judicial seizure** to secure payment of any fines and penalties which Florida might validly impose.

There remains the question of requiring evidence of financial responsibility to pay claims for shoreside *damage* to State and private interests, as distinguished from clean-up costs. Any owner of shoreside property who has a claim for damage due to an oil spill from a vessel now has the right to obtain security either by causing the offending vessel to be arrested,*** or by seizing the assets of the owner by writ of maritime attachment.**** These radical and effective procedures for obtaining security and jurisdiction are available to anyone having a maritime claim; under the Admiralty Extension Act, 46 U.S.C. §740, their benefits are completely available to claimants for damages to shoreside property. Since shoreside claimants can accordingly obtain jurisdiction, and security to cover any claims, there is no need to impose on vessel owners the burden of giving

* "In general, an insurance policy is against public policy and void if its purpose and intent are to indemnify [an] insured against a violation of law by him or with his permission, or to hamper or impede the enforcement of the law against the actual offender, as where it indemnifies [an] insured against the consequences of a violation of a criminal statute by him." 44 C.J.S., pp. 1005-6 (1945); see *Globus v. Law Research Service, Inc.*, 418 F.2d 1276, 1288 (2d Cir. 1969), *cert. den.* 397 U.S. 913 (1970).

** See *C. J. Hendry v. Moore*, 318 U.S. 133 (1943).

*** Fed. R. Civ. P., Supplemental Rules C and E.

**** Fed. R. Civ. P., Supplemental Rules B and E.

massive double security for claims which may never arise and which, because clean-up is undertaken under the aegis of the Federal Government pursuant to the National Contingency Plan, will in all likelihood be relatively minor.

It will be remembered that the vessels under discussion will all be vessels whose owners or operators, at considerable expense for marine insurance, application fees and "vessel certification" fees, have already convinced the Federal Maritime Commission (F.M.C.) of their financial responsibility to meet claims under W.Q.I.A., up to the lesser of \$100 per gross ton or \$14 million. The legislative history of W.Q.I.A. reveals that Congress, in setting these limits of liability, heard testimony on the availability of insurance, and that the evidence of financial responsibility required by the Federal Government is geared to the maximum. The following excerpts from the Report of the Committee on Public Works submitted by Senator Muskie, (United States Senate Report No. 91-351) relating to vessels are revealing:

"The type of liability to be imposed presented the committee with a great many questions. Extensive testimony was taken and subsequent extensive discussion occurred in executive session on the factors which should be considered in determining the type of liability. Among those factors were (1) the effect of too rigid a liability test on maritime commerce; (2) the availability of insurance for any specific amount or type of liability; (3) the economic impact of any specific amount of liability on the owner of the vessel, the shipper of the oil and the consumer; and (4) the impact of a burdensome liability test on the U.S. Government and the people of the United States." (p. 5)

• • •

"Financial responsibility"

The bill establishes a mechanism whereby the U.S. Government can be assured that vessels using the waters of the United States are financially able to pay clean-up costs incurred by the U.S. Government up to \$100 per gross ton of the largest vessel owned or operated by a person. It requires that any vessel over 300 gross tons, including any barge unit of equivalent size, establish and maintain evidence of financial responsibility. The figure of \$100 is based on the committee's belief that absolute liability as imposed with exceptions is similar to the concept of liability based on negligence with a reverse burden of proof and therefore should be insurable to a similar level. The figure reflects an attempt by the committee to assure maximum protection to the U.S. Government while not requiring uninsurable evidence of financial responsibility." (p. 18)

After extensive hearings, Congress set its requirements for evidence of financial responsibility at the maximum considered insurable. Having thus effectively preempted the field, Congress did not leave room for individual states to make additional requirements; it is perhaps for this reason that the 1972 Amendments contained the provision discussed above setting up a system whereby states could recover their clean-up costs from the Federal fund. It is clear that Congress did not intend that a vessel which satisfied the Federal Government's requirements in this regard should be barred from the navigable waters of the United States. There are of course no such waters which are not also waters of a state, territory, or the District of Columbia. Even in the present setting of this case one can visualize the chaos which would overtake maritime commerce to and from the United States if financial responsibility legislation on the lines of the Florida Act were enacted by each of the coastal states without consideration of the four factors enumerated in the Report of Senator Muskie's Subcommittee, *supra*, p. 8.

Analysis of the Section* of the 1970 Federal Act concerning oil pollution reveals that independent preventive state action is contemplated only in Subsection (e), which deals solely with discharges "from an onshore or off-shore facility", and not with discharges from vessels. Subsection (c) (2) (A) contemplates that "State and local agencies" are to be assigned responsibilities under the National Contingency Plan with respect to minimizing damage from oil discharges generally. It thus appears that former Section 1161 (o) (2) of 33 U.S.C. was meant to preserve to the states their power to regulate *permanent* installations, and was *not* intended to extend their regulatory power to vessels engaged in interstate and international, or even intrastate, maritime commerce. This fact, plus the requirement that the evidence of financial responsibility under the Federal Act is geared to the maximum insurable, results in implied preemption, at least in this limited area, insofar as vessels are concerned. See *Northern States Power Company v. State of Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd* 405 U.S. 1035 (1972).

The form of insurance certificate required by Florida cannot be issued by the Appellee Mutual Insurance Associations because the form required contains no exceptions to liability—not even acts of war or nuclear incidents—and the Associations do not insure in respect of either. As can be seen from the excerpts from the Report of the Committee on Public Works, United States Senate, Report Number 91-351 submitted by Senator Muskie, the Committee accepted the fact that certain defenses and exceptions were essential to those providing insurance evidence of financial responsibility and geared its requirements accordingly. But because Florida has not accepted these defenses and exceptions, and will impose a penalty of up to \$50,000 per day pursuant to Section 16 of the Florida Act if a vessel calls at a Florida port without having furnished a type of evidence of financial

* 33 U.S.C.A. §1321, formerly 33 U.S.C. §1161.

responsibility which is simply not obtainable, the result is that vessels which have satisfied the Federal requirements will be barred from Florida waters. Incidentally, it should be noted that the Federal Maritime Commission has recognized all of the Appellee Insurance Associations as qualified insurers, and accordingly freely accepts their insurance certificates as evidence of financial responsibility under W.Q.I.A.* This being the case it should not be a requirement that insurers of vessels in international trade, accepted as qualified by the Federal Government, must also apply for qualification in every state at which one of their assured's vessels might occasionally call; yet this, as can be seen from Appendix B, is precisely what Florida is requiring.

In any case, the administrative burden and cost of issuing and maintaining in current status separate certificates of insurance for the benefit of Florida and every other state, country or province that might follow the example of Florida would present an insurmountable task. Marine insurance is changed with a change of ownership, and not infrequently even when ownership does not change. The Association concerned would have the burden of notifying every state, country and province to which an insurance certificate had been issued that it would no longer have validity after a specified date. Arrangements would some-

* W.J. Smith, *Financial Responsibility under the Water Quality Improvement Act*, 9 HOUST. L. REV. 657, 658-9 (1972). Also qualified is the Water Quality Insurance Syndicate. W.Q.I.S. is composed of 27 insurance companies, comprising virtually the entire American marine insurance market. Included in its policy limits of \$100 per gross ton or \$14 million, whichever is the lesser, is protection against such liability as may be imposed by any state, or any political subdivision thereof, for the cost of cleaning up an oil spill; *provided, however, that such liability is not any broader than under W.Q.I.A. itself, and that the state or municipal law recognizes the same defenses as are allowed thereunder*. Since Florida does not recognize these defenses, W.Q.I.S. certificates would not meet Florida's present requirements.

how have to be made to remove from the vessel the certificates of financial responsibility issued by the various national, state and provincial governments, unless new proof of financial responsibility was furnished. In the case of a purchase, the new owner would have to complete elaborate application forms, such as that required by Florida.

The owners and operators of foreign vessels, which supply a very large part of our energy and other needs, would be unable to qualify as self-insurers since they would not have the substantial assets "located in the United States or its possessions" contemplated by the Instructions for completing the "Application for Certificate of Responsibility" and by the "Application for Authority to Self-Insure" (See Appendix B hereto).

It is plain from the foregoing that enforcement of Section 14 of the Florida Act will leave many owners, whose responsibility has already been verified by F.M.C., with no choice (unless the charterers, consignees or some other third parties can meet Florida's requirements and can be persuaded to act as guarantors) but to exclude Florida ports from the trading limits specified in their time charters and consecutive voyage charters. This will not result in cleaner water—except as a result of a decrease in maritime commerce—but is bound to result in a substantial increase in the freight rates charged by vessels whose owners or charterers are able to satisfy Florida's requirements, e.g., by qualifying as self-insurers, and will result in a decrease in the quantities available to consumers of oil and other imports and a corresponding increase in their price. These untoward consequences—the result of allowing a state to impose requirements not contemplated by Congress initially, and any possible justification for which was removed by the 1972 Amendments to W.Q.I.A.—certainly constitute an undue burden on interstate commerce.

Florida's requirement that it be furnished evidence of financial responsibility by vessels using its ports is a head-on collision between the Federal and State governments which is apparent in the present setting of this case and which does not need to be demonstrated by a test case of a vessel being turned away from Florida waters by Florida officials, or penalized up to \$50,000 per day because of being within those waters without having given Florida evidence of financial responsibility. It is submitted that the Court should rule on this now, and not require subsequent time consuming and expensive litigation when a vessel, having satisfied Federal financial requirements, is nevertheless barred from state waters.

II

The slip opinion appears to vitiate the reforms sought to be accomplished by the Admiralty Extension Act; it should therefore be modified so as to require application of Federal maritime law to the determination of the basis of liability for ship-to-shore damage, whether the claim is heard by a State or a Federal court.

The slip opinion in its treatment of the Admiralty Extension Act* omits mention of the fact that it was passed to alleviate the injustice which previously existed in cases where land claimants—owners of a bridge, pier, *etc.*—had their property damaged by collision with a vessel. Under

* The Act provides:

"The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, *caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.* In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done or consummated on navigable water . . ." 46 U.S.C. §740 (Emphasis added).

the law existing prior to passage of the Act the vessel owner, whose claim was (and still is) governed by the General Maritime Law, could recover 50% of his damages from the land claimant in a situation where both parties were negligent, while the land claimant, who was obliged to proceed under the common law of his state, was generally barred from any recovery under the contributory negligence rule.* The Act placed both parties on an equal footing, allowing land claimants not only to recover in cases where both parties were negligent, but to invoke the admiralty remedies of arrest and writ of foreign attachment to pursue and secure recovery on their claims. It is of course undeniable that the damage to beaches caused by oil spillage from a vessel is a "case of damage or injury to . . . property, caused by a vessel on navigable water", and "done or consummated on land".** Accordingly, prior to issuance of the slip opinion, it would have been open to land claimants in such a case to proceed against pollution defendants either in a state court, pursuant to the saving clause of 28 U.S.C. §1333(1),*** or in the federal courts, their claims in either forum to be determined under uniform principles of substantive maritime law.

But the rationale of the slip opinion would defeat the purpose of the Admiralty Extension Act, since if State

* See Gilmore and Black, *The Law of Admiralty*, §7-17, pp. 432-434. See also, Briefs *Amici* of the Maritime Law Association of the United States (pp. 11-15) and the American Bar Association (pp. 2-3).

** Equally clear is the fact that *Victory Carriers v. Law*, 404 U.S. 202 (1971), involving an injury to a longshoreman while operating a "forklift" truck on shore, was not a case of injury "caused by a vessel on navigable water."

*** "The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

1. Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

law is now to apply to claims by shore installations for damage by vessels, the result will be that contributory negligence of a drawbridge will, under Florida law as it is now, bar any recovery by it from a vessel, whereas under the General Maritime Law a vessel would be liable for half of the damages of the owner of the drawbridge, which might be the State of Florida.

The slip opinion does not distinguish between the admiralty jurisdiction of the Federal Courts, on the one hand, and the substantive law which is to be applied, regardless of the forum, on the other.* The necessity for observing such a distinction has recently been stressed by this Court in *Moragne v. States Marine Lines*, 398 U.S. 375 (1970). In discussing the question whether the Death on the High Seas Act** was intended to foreclose nonstatutory Federal remedies for wrongful death, which might otherwise be found appropriate to effectuate the policies of the General Maritime Law, Mr. Justice Harlan noted in *Moragne*:

"The only discussion of exclusive jurisdiction in the legislative history is found in the House floor debates, during the course of which Representative Volstead, Floor Manager of the Bill and Chairman of the Judiciary Committee, told the members that exclusive jurisdiction would follow necessarily from the fact that the Act would be part of the Federal Maritime Law. [Citation omitted]. This erroneous view disregards the 'saving clause' in 28 U.S.C. §1333, and the fact that *Federal Maritime Law is applicable to suits brought in State Courts under the permission of that clause.*" 398 U.S. at p. 400, note 14. (Emphasis added).

* The slip opinion states, p. 15, that the Act does not "sanctify the federal courts with exclusive jurisdiction to the exclusion of powers traditionally within the competence of the states". This result was never urged, and has never been thought required by the Act, the availability of a state forum being guaranteed by the "saving clause" *supra*.

** 41 STAT. 537; 46 U.S.C. §761 *et seq.*

Thus the slip opinion creates a situation in which it now becomes uncertain whether state substantive law may apply to the class of cases encompassed by the Admiralty Extension Act—sea-to-shore tort claims. Appellees submit that the conflict between the slip opinion and *Moragne* should be resolved, and the beneficial effects of the Admiralty Extension Act thereby saved.

If it is the intention of the slip opinion that the substantive law to be applied to ship-to-shore damages and injuries will depend upon choice of forum—Federal maritime law in a Federal forum and State law in a State forum—it will surely encourage “forum shopping”, a practice which has been uniformly criticized.*

On the other hand, if it is intended that only State *water pollution laws* such as the Florida Act are to be excluded from the maritime domain as extended by the Admiralty Extension Act, and that Federal maritime law is still to be applied to *other* ship-to-shore damages, then one class of shoreside damage claimants—shorefront property owners damaged by a discharge of oil from a vessel—will be given treatment radically different from that afforded to shoreside personal injury claimants and other shoreside claimants injured or damaged by vessels, as in a ship-to-bridge collision case.

The slip opinion quotes extensively from *Just v. Chambers*, 312 U.S. 383 (1941), in support of the doctrine that “a State may modify or supplement maritime law even by creating a liability which a court of admiralty would recognize and enforce, provided the state action is not hostile ‘to the characteristic features of the maritime law or inconsistent with federal legislation.’” But these were not

* See *Pope & Talbot, Inc. v. Hawk*, 346 U.S. 406, at 410-411 (1953).

the only limitations imposed by *Just* on the right of the states to act in the maritime sphere. The Court in that case also noted that to have validity the state legislation must not "interfere with [the] proper harmony and uniformity [of the maritime law] in its international and interstate relations."*

It is thus plain that to find invalidity in state legislation in the maritime sphere it is not necessary that there be a direct conflict between State law and federal law; it is enough if the State law "interfere[s] with the proper harmony and uniformity" of the maritime law.

After a full hearing, the three-judge District Court unanimously found that if applied to Appellees' vessels "the Florida Act would effect—in the words of *Jensen*—the destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded.' "*** This finding would appear to bring the Florida Act under the limitation on state power recognized in *Just*. But if any doubt remains as to the facts the slip opinion should be modified so as to call not for a reversal of the three-judge Court's unanimous decision but for a remand of the case to that Court with instructions to hear further evidence on and decide the question whether the Florida Act

* The criticism of *Southern Pacific v. Jensen*, 244 U.S. 205 (1917) and *Knickerbocker Ice Co. v. Stewart* 253 U.S. 149 (1920), Appellees submit, has been focused in the wrong direction. Their basic tenet—that federal authority in the maritime sphere is exclusive, except in matters of purely local concern—is the foundation of our national maritime policy. Any criticism of *Jensen* and *Knickerbocker* should, in Appellees' view, be directed, not to this basic tenet, but to the Court's finding in those cases that deaths and injuries of long-shoremen and similar shoreworkers are *not* matters of purely local concern.

** Opinion below, App. p. 44.

"interfere[s] with [the] proper harmony and uniformity [of the maritime law] in its international and interstate relations."

CONCLUSION

The slip opinion is being interpreted as giving each of the states as well as the Federal Government the power to legislate differing standards of liability for maritime commerce on the navigable waters of the United States to an extent which disturbs those who hitherto have regarded the United States of America as a maritime nation, rather than a loose federation of independent maritime states. The Attorney General of Florida is reported to have urged on the basis of the slip opinion that Florida's Senators vote against ratification of the International Convention on Civil Liability for Oil Pollution Damage,* because "the treaties were written by 'maritime oriented' delegates chosen by the State Department, not by environmentalists." (The Tampa Tribune, April 26, 1973, p. 24A). While the Court's consistent interpretation of the Admiralty Clause has enabled the Federal Government to deal with maritime problems on a uniform interstate and international basis, the slip opinion results in "Balkanization" and seems

* The 1969 Convention on Civil Liability for Oil Pollution Damage, Executive G, 91st Cong., 2nd Sess., was reported out favorably by the Senate Foreign Relations Committee with the recommendation that it be held in abeyance pending formulation of a supplementary convention setting up a fund of \$35 million to be available to claimants even where there is no liability on the part of the shipowner. The 1971 Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, Executive K, 92nd Cong., 2nd Sess., has since been signed and hearings with respect thereto have been held by the Senate Foreign Relations Committee. It may be reported out of Committee in late May or early June of this year. Senate Bill 841 is a bill which would implement both conventions.

to infer that this is acceptable, save with regard to the "... relationship of vessels plying the high seas and our navigable waters, to their crews."*

Appellees pray that the Petition for Rehearing be granted and the slip opinion be modified to the extent of declaring invalid (1) the provisions of Section 14 of the Florida Act requiring vessel owners and operators to furnish evidence of financial responsibility satisfactory to State authorities as a condition to the use of Florida's ports, and (2) the provisions of Section 12 substituting state substantive law for federal maritime law as the basis of liability for pollution damage caused by vessels to shore-side property.

Alternatively, Appellees pray that the case be remanded to the Court below for consideration of Commerce Clause and other Constitutional challenges not mentioned in the slip

* Slip Opinion, p. 18. May shipowners successfully argue that rights of land claimants in collisions between vessels and fixed structures are now to be decided under state law, because not involving vessel/crew relationships? It has been thought otherwise to date:

"The collision [between a vessel and an offshore drilling platform] was a classic maritime case within the validly extended Admiralty jurisdiction, in which both substantive rights and remedies . . . were quite ample. There is no void, there are no gaps. If there were, the Admiralty, under the guidance of a Judge having all the flexibility of a sea-going Chancellor, . . . has adequate resources without calling on adjacent state law." *Continental Oil Co. v. London Steamship Own. Mut. Ins. Ass'n.*, 417 F. 2d 1030, 1036-7 (1969).

In any case, neither *Southern Pacific v. Jensen*, 244 U.S. 205 (1917) nor *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920) involved the relationship of ocean-going vessels "to their crews". *Knickerbocker* involved the death of a bargeman, and *Jensen* that of a longshoreman.

opinion, nor reached below,* by reason of the decision there that the Florida Act was an attempt "to legislate substantive maritime law which, under the United States Constitution is exclusively within the Federal domain."**

Respectfully submitted,

JOSEPH C. JACOBS

JOHN B. CHANDLER, JR.

STEWART D. ALLEN

*Attorneys for Appellees,
The American Waterways
Operators, Inc., et al.*

LEROY COLLINS

ERVIN, VARN, JACOBS & ODOM

ROGERS, TOWERS, BAILEY, JONES & GAY
Of Counsel

NICHOLAS J. HEALY

GORDON W. PAULSEN

*Attorneys for Appellees,
American Institute of
Merchant Shipping,
Assuranceforeningen
Gard, et al.*

HAIGHT, GARDNER, POOR & HAVENS

HEALY & BAILLIE

FOWLER, WHITE, GILLEN, HUMKEY, KINNEY
AND BOGGS, P.A.

DEWEY R. VILLAREAL, JR.

RAYMOND A. CONNELL

EMIL A. KRATOVIL, JR.
Of Counsel

* Modification and remand for consideration of issues in similar situations were summarily granted in *Union Trust Co. v. Eastern Airlines*, cert. den. 350 U.S. 907 (1955), reopened and remanded, 350 U.S. 962 (1956), and in *Parks v. Simpson Timber Co.*, unreported per curiam opinion of June 12, 1967 reversing judgment amended, and case ordered remanded for consideration of further issues below, 389 U.S. 909 (1967); 388 U.S. 459 (1967).

** Opinion below, Appendix p. 40.

Certificate of Counsel

We certify that this Petition is presented in good faith
and not for delay.

.....

.....

.....

.....

.....

APPENDIX A

THE JOURNAL OF COMMERCE AND COMMERCIAL

99 Wall Street, New York, N.Y. 10005
New York, Wednesday, May 2, 1973

An Issue Still With Us

WHATEVER MAY be said about the legal reasoning upon which the Supreme Court based its decision upholding the Florida oil spill law, this much is apparent: It solves nothing. Problems are multiplied, not reduced. All that is established is the prospect of confusion, litigation, and the thwarting of any genuinely effective national policy governing liability for pollution in the transport by water of an essential fuel. This comes at a time when the energy crisis is recognized by the American people as approaching the most serious proportions.

It is unfortunate that cases such as that involving the Florida act, almost inevitably, are viewed by some elements as tests between the righteous foes of pollution and those who, for their own profit, seek to escape with minimal penalties when their operations cause pollution of the environment. This was in no sense an issue in the test of the Florida law. Predictably, however, no sooner had the Supreme Court announced its decision than the advocates of extra-tough local environmental statutes were hailing it as a victory.

Assemblyman Chester Apy of New Jersey, for example, said he would introduce legislation based on the Florida law, "set up so that we could sue for both costs and damages, no matter if the spill occurred beyond the three-mile limit—once it washes into our waters, the party responsible would be sued."

* * * *

Appendix A

IN DELAWARE, the House majority leader of the legislature, who just happens to come from the resort area of Rehoboth Beach, said the state's already stringent law would be made tougher, following the Florida pattern. Delaware's coastal zoning act already forbids creation of an offshore "superport" in the state's coastal waters and now, commented former Governor Russell W. Peterson, the state has "the strength to cope with a superport," presumably a reference to the proposed oil transfer facility which would be in ocean waters outside Delaware Bay.

Delaware probably is not the only state which would like to see all aspects of oil shipment, with the danger of pollution, kept away from its shores. But we feel safe in saying that the people of Delaware, New Jersey or any other state also want their supplies of gasoline and fuel oil to continue uninterrupted, and at a reasonable cost. Neither the nation's energy needs nor the nation's anti-pollution objectives can be well served by simply frightening tankers away with a hodge-podge of local statutes, alike only in their disregard for established and reasonable standards of maritime liability.

Both United States law and the international conventions drafted to combat pollution specify limits on the shipowner's liability—\$14 million and \$15.4 million, respectively. They exempt the vessel where it is the victim of conditions beyond its control, such as a severe storm, an act of war, government negligence in wrongly placing channel markers, and so on. But the Florida law allows unlimited liability for damages, it imposes "absolute liability," meaning no exceptions regardless of circumstance, and it requires among many other things, separate proof of the vessel's financial responsibility under the state law.

Appendix A

While the Supreme Court opinion remarks that the Federal Limitation of Liability Act extends "to damages caused by oil spills even where the injury is to the shore," the interpretation in the industry is that the decision nevertheless gives the green light to states to adopt legislation similar to Florida's. Indeed, it places their legislatures under heavy pressure to do so, since no politician will wish to be accused of less zealous concern for the environment than those in other states.

In this manner, the decision sets back most seriously the endeavor to establish a firm, coherent, reasonable, readily understood, uniform national policy with respect to liability for pollution in the navigable waters of the United States. The mood of the advocates of localized legislation such as Florida's was revealed in disquieting fashion by the state attorney general's declaration, following the decision, that the United States now should refuse to ratify the international convention dealing with liability for oil spills.

* * *

THE UNANIMOUS Supreme Court decision reversing the federal court in Florida makes these points:

"To rule as the District Court has done is to allow federal admiralty jurisdiction to swallow most of the police power of the states over oil spillage—an insidious form of pollution of vast concern to every coastal city or port and to all the estuaries on which the life of the ocean and the lives of the coastal people are greatly dependent. . . . Moreover, while the federal act determines damages measured by the cost to the United States for cleaning up oil pollution, the damages specified in the Florida act relate in part to the

Appendix A

cost to the State of Florida in cleaning up the spillage. These two sections are harmonious parts of an integrated whole. . . . A state may have public beaches ruined by oil spills. Shrimp, clam, oyster and scallop beds may be ruined and the livelihood of fishermen imperiled. The federal act takes no cognizance of those claims but only of costs to the Federal Government, if it does the cleaning up."

ALL THIS MAY leave one with the impression that the Florida act or any similar state legislation is no more than a claim for what is just and reasonable. But it seems to us that the court's opinion, written by Justice Douglas, achieves this effect only by deferring to some future date the legion of difficulties which may realistically be expected as a result of the decision.

For example, what if the state does the cleaning up, at greater cost than if the Federal Government had done it? Writes Justice Douglas: ". . . It will be time to resolve any such conflict between federal and state regimes when it arises." What about the Florida act's requirements for oil spill "containment gear," normally a subject of federal regulation and covered in rules issued by the Coast Guard in 1972? The answer, says the court, must "await a concrete dispute under applicable Florida regulations."

It should be kept in mind, moreover, that the number of "conflicts" and "concrete disputes" in this instance must be multiplied by the number of states adopting similar laws.

As for destruction of oyster and scallop beds and similar damage to natural marine resources because of oil spills, injured parties would still have recourse to the general maritime law to satisfy their claims. In fact, Congress did not provide for such claims in the 1970 Water Quality Improvement Act for the very reason that it was fully aware of these other avenues.

Appendix A

The Florida act was opposed in the courts by the American Institute of Merchant Shipping, the American Waterways Operators, Inc., representing the barge and towboat industries, and some 15 maritime insurance "protection and indemnity" groups. Their contention was that the paramount authority over maritime activities in waters of the United States and inland waterways belongs to the Federal Government under the Constitution and that the Florida law runs contrary to several acts of Congress and to the long precedents of maritime law.

A number of states already have adopted water pollution laws which vitally affect shipping, AIMS and the P&I groups said in their brief to the Supreme Court. They added: "These laws are by no means uniform, and their enforcement could lead to chaotic results."

That was the real issue in the Florida case. The Supreme Court's decision leaves it unanswered. It is still with us, larger than ever.

APPENDIX B

**STATE OF FLORIDA
DEPARTMENT OF NATURAL RESOURCES**

April 20, 1973

**All Vessel and Terminal
Owners or Operators**

Gentlemen:

On April 18, 1973, the United States Supreme Court re-validated the Oil Spill prevention and pollution control Act, Chapter 376, Florida Statute.

As Director of the Division of Marine Resources, Florida Department of Natural Resources it is my responsibility to furnish you the enclosed applications. This will enable you to comply with the provisions of this Chapter.

If additional information is needed, please contact Major John Walker, in care of this Department.

Sincerely,

**Harmon Shields, Director
Division of Marine Resources**

**HS/jwg
Enclosures**

Appendix B

FORM FMP—0-7A

FLORIDA DEPARTMENT OF NATURAL RESOURCES
APPLICATION FOR CERTIFICATE OF FINANCIAL
RESPONSIBILITY (VESSELS AND BARGES)

INSTRUCTIONS

Submit the application to the Executive Director, Florida Department of Natural Resources, Larson Building, Tallahassee, Florida, 32304, U.S.A. The application is in four parts: Part I—General; Part II—Evidence of Financial Responsibility; Part III—Declarations; and Part IV—Concurrence of Agent. Applicants must answer all questions. If a question does not apply, answer "not applicable" or "none", as appropriate. If additional space is required, supplementary sheets may be attached.

Part I.

1. Self explanatory.
2. Previously issued certificates refer to certificates of financial responsibility for vessels and barges, and not for terminal facilities.
3. Self explanatory.
4. See Part IV and execute. Legal agent must be located in Florida for purpose of service of process.

Part II.

5. Self explanatory.
6. Self explanatory. (See Chapter 16B-16.08)
7. Self explanatory. (See items 8, 9, 10, 11)

Appendix B

8. Form FMP-0-0801 and the insurance policy, complete with all exclusions and endorsements, must accompany this application, if applicant intends to show evidence of insurance.

Evidence of Insurance must be conditioned to pay all costs and expenses of the cleanup of any prohibited discharge or other polluting condition as well as damages caused to the state and any other person.

Insurance companies must be either authorized to do business in the State of Florida or approved by the Surplus Lines Carrier list which is compiled monthly by the National Association of Insurance Commissioners.

Please note that policies issued pursuant to the requirements of the Federal Maritime Commission will not be accepted by the Florida Department of Natural Resources for compliance with the requirements of Chapter 376, Florida Statutes.

9. Form FMP-0-0802 and power of attorney must accompany application, if applicant intends to show evidence of a surety bond.

10. Form FMP-0-0803 and required escrow deposit must accompany application, if applicant intends to qualify as a self-insured.

11. Any guarantor (third party) of any applicant must show financial responsibility either through the method of insurance, surety bond, self insurance, or other evidence acceptable to the Department. Appropriate proof must accompany the application. Form FMP-0-0804 must accompany application if applicant intends to qualify through a guarantor.

Appendix B

Form FMP-0-0805 must accompany application if applicant intends to qualify under evidence of other financial responsibility. A financial statement reflecting the applicant's most recent financial condition shall accompany the application. The financial statement shall consist of a balance sheet, income statement and a statement of retained earnings and shall be certified by a certified public accountant licensed in any state of the United States or a public accountant licensed by the State of Florida Department of Professional and Occupational Regulation. The financial statement shall be examined by the Department staff. A negative staff opinion shall result in disapproval of the application.

All assets included in the financial statement must be located within the United States or its possessions.

Part III. Self explanatory.

Part IV. Self explanatory.



FLORIDA
DEPARTMENT OF NATURAL RESOURCES
APPLICATION FOR CERTIFICATE OF
FINANCIAL RESPONSIBILITY (VESSELS)

NAME OF STATE OR FOREIGN COUNTRY IN WHICH INCORPORATED:

DATE OF INCORPORATION OR
ORGANIZATION:

6.

(c) IF A PARTNERSHIP, GIVE NAME AND ADDRESS OF EACH PARTNER:

7.

(d) APPLICANT'S FISCAL YEAR:

(month) (Day) TO (month) (Day)

FOR STATEMENT OF APPLICANT'S FLORIDA AGENT OR OTHER PERSON AUTHORIZED BY APPLICANT TO
ACCEPT LEGAL SERVICE IN THE STATE OF FLORIDA (See PART IV).

FILE COPY

Supreme Court, U. S.
FILED

MAY 23 1973

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

No. 71-1082

REUBIN O'D. ASKEW, et al.,

Appellants,

vs.

THE AMERICAN WATERWAYS OPERATORS,
INC., et al.,

Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF FLORIDA

~~MOTION OF~~ APPELLEES THE AMERICAN WATER-
WAYS OPERATORS, INC., AMERICAN INSTITUTE OF
MERCHANT SHIPPING, AND ASSURANCEFORENIN-
GEN GARD, ET AL., ~~FOR~~ TO SUPPLEMENT
TO ~~THEIR~~ PETITION FOR REHEARING, ~~TOGETHER~~
~~WITH SUPPLEMENTAL PETITION~~

JOSEPH C. JACOBS
JOHN B. CHANDLER, JR.
STEWART D. ALLEN
*Attorneys for Appellees,
The American Waterways
Operators, Inc., et al.*

LEROY COLLINS
ERVIN, VARN, JACOBS & ODOM
ROGERS, TOWERS, BAILEY,
JONES & GAY
Of Counsel

NICHOLAS J. HEALY
GORDON W. PAULSEN
*Attorneys for Appellees,
American Institute of Merchant
Shipping, Assuranceforeningen
Gard, et al.*

HAIGHT, GARDNER, POOR &
HAVENS
HEALY & BAILLIE
FOWLER, WHITE, GILLEN,
HUMKEY, KINNEY AND
BOGGS, P.A.
DEWEY R. VILLAREAL, JR.
RAYMOND A. CONNELL
EMIL A. KRATOVIL, JR.
Of Counsel

THE BUREAU OF THE

THE BUREAU OF THE

IN THE

Supreme Court of the United States

October Term, 1972

No. 71-1082

REUBIN O'D. ASKEW, et al.

Appellants,

vs.

THE AMERICAN WATERWAYS OPERATORS, INC., et al.,

Appellees,

Motion For Leave to Supplement Petition For Rehearing

Appellees The American Waterways Operators, Inc., *et al.*, American Institute of Merchant Shipping, and Assuranceforeningen Gard, *et al.*, respectfully move for leave to file the annexed Supplement to their Petition for Rehearing filed May 14, 1973.

The annexed Supplement points out that the questions decided in *City of Burbank v. Lockheed Terminal*, No. 71-1637, handed down the same day Appellees' Petition for Rehearing was filed, are essentially the same as those presented in this case but that the rationales and results of the two opinions appear irreconcilable. Accordingly, leave

is asked to file the annexed Supplement for the purpose of drawing these facts to the attention of this Honorable Court.

Respectfully submitted,

JOSEPH C. JACOBS

JOHN B. CHANDLER, JR.

STEWART D. ALLEN

*Attorneys for Appellees,
The American Waterways
Operators, Inc., et al.*

NICHOLAS J. HEALY

GORDON W. PAULSEN

*Attorneys for Appellees,
American Institute of
Merchant Shipping,
Assuranceforeningen
Gard, et al.*

Supplemental Petition for Rehearing

NOW COME Appellees The American Waterways Operators, Inc., *et al.*, American Institute of Merchant Shipping, and Assuranceforeningen Gard, *et al.*, and their respective members, who respectfully pray that this Honorable Court grant rehearing of this cause, for the reasons set forth in their Petition for Rehearing filed May 14, 1973, as hereby supplemented.

The slip opinion handed down May 14, 1973 in *City of Burbank v. Lockheed Air Terminal*, No. 71-1637, affirmed exclusive Federal control of aircraft, whereas the slip opinion in the present case appears to allow the States to exercise extensive legislative control over vessels using the navigable waters of the United States.

It is true that the Water Quality Improvement Act of 1970, as amended,¹ contains a "non-preemption" clause.² Appellees submit, however, that that clause was not intended to apply to the regulation of vessels, at least insofar as "evidence of financial responsibility" is concerned and that it must be considered in the context of the totality of Federal regulation of vessels.

As pointed out at page 10 of Appellees' Petition for Rehearing, §1161 (o) (2) of 33 U.S.C. [now §1321 (o) (2)] should be read in context with §1161 (e) [now §1321 (e)], which preserves to the States the right to legislate with respect only to "an actual or threatened discharge of oil into or upon the navigable waters of the United States

¹ P.L. 91-224, 84 Stat. 91, as amended by Federal Water Pollution Control Act Amendments of 1972, P.L. 92-500, 86 Stat. 816; 33 U.S.C.A. §§1251-1376. The 1972 Amendments have not as yet appeared in the Official U.S. Code.

² P.L. 92-500, 86 Stat. 816, §311 (o) (2); 33 U.S.C.A. §1321 (o) (2).

from an *onshore or offshore facility* . . ."³ (emphasis added); Congress did *not* intend to give the States the right to regulate vessels. By imposing what it was satisfied were maximum liabilities, and by demanding maximum evidence of financial responsibility under the Federal Act, Congress in fact preempted that field with respect to vessels⁴ because it "left no room for the States to supplement . . ."⁵ those requirements.

Any doubt concerning Federal preemption with respect to "evidence of financial responsibility" was resolved by Congress when, by the 1972 Amendments, it added Subparagraph (H)⁶, which made it clear that the Federal Act addressed itself to State recoveries of clean-up costs from the Federal Government. The Attorney General of Florida conceded at the oral argument on November 14, 1972 that "If the federal act were to address itself to state recoveries, which it does not, then such a conflict might be found."⁷ The Attorney General was mistaken in his belief that the Federal Act does not address itself to State recoveries. In fact it does so address itself, and therefore, as he would appear to concede, a conflict in fact exists.

³ P.L. 92-500, 86 Stat. 816, §311 (e); 33 U.S.C.A. §1321 (e).

⁴ See Appellees' Petition for Rehearing filed May 14, 1973, pp. 8-9. It is significant that the Federal Act requires evidence of financial responsibility only with respect to vessels, and not onshore and offshore facilities. The Florida Act, on the other hand, requires such evidence from terminal facilities, as well as vessels. As suggested in the Solicitor General's Brief *Amicus*, the Federal Act would appear to have preempted the field of "evidence of financial responsibility" only insofar as vessels are concerned.

⁵ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), quoted with approval at p. 9 of the *Burbank* slip opinion.

⁶ 86 Stat. 816, §311 (c) (2) (H); 33 U.S.C.A. §1321 (c) (2) (H). See Appellees' Petition for Rehearing, filed May 14, 1973, p. 5.

⁷ Transcript, pp. 14-15.

It became necessary for Congress to enact Section 1508 of the Federal Aviation Act of 1938⁸ because the authors of the Constitution did not contemplate that airspace would become a medium of interstate and foreign commerce. But the Constitution itself, by the Admiralty Clause, provided for Federal control of the navigable waters of the United States. With respect to control of maritime matters, "it was universally agreed at that time, that as this jurisdiction brought us into relations with the citizens and subjects of foreign countries, uniformity was indispensable. Amid all the questions on which our ancestors wrangled this is one of the few that was conceded to the common government without a groan."⁹ Giving the States the power to bar vessels from their ports unless they meet State-imposed "financial responsibility" requirements, in addition to those imposed by the Federal Government, results in the same type of "fractionalized control" with respect to maritime commerce that is decried in *Burbank* (slip opinion, page 15) with respect to air commerce.

The District Court in *Burbank* found the take-off curfew ordinance unconstitutional on both "preemption/conflict" and "undue burden" grounds, under the Commerce and Supremacy Clauses.¹⁰ This Court, because *affirming*

⁸ P.L. 85-726, 72 Stat. 731; 49 U.S.C. §1301 *et seq.* See p. 3 of the *Burbank* opinion.

⁹ Bausman, *Admiralty and Maritime Jurisdiction*, 36 AMER. L. REV. 182, 186 (1902). The author uses the term "jurisdiction" in the sense in which it was frequently used in earlier days, i.e., as referring to "a general authority to govern", and not merely to "the scope of judicial authority". See Robertson, *Admiralty and Federalism*, p. 136 (1970).

¹⁰ *Lockheed Air Terminal, Inc. v. City of Burbank*, 318 F. Supp. 914, 921 *et seq.* (preemption), 926 *et seq.* (undue burden) (C.D. Calif. 1970); *Burbank* slip opinion, p. 2, note 1.

on Supremacy "preemption/conflict" grounds, did not reach the Commerce Clause "undue burden" challenge.¹¹ In *Askew*, however, the situation is reversed. The District Court found the Florida pollution regulatory scheme unconstitutional only on Admiralty Clause grounds, and expressly declined to reach alternate Commerce Clause "undue burden" and other constitutional challenges;¹² but the slip opinion in *Askew*, though reversing on the Admiralty Clause challenge, nowhere considered the "undue burden" or other constitutional objections presented on the record.

We submit that the *Askew* slip opinion should be modified as requested in the Petition for Rehearing, or at least remanded for consideration of Constitutional objections under the Commerce and Supremacy clauses, so that the apparent inconsistencies between *Burbank* and *Askew* might be resolved.

¹¹ *Burbank* slip opinion, p. 2, note 1.

¹² Opinion below, A40.

Respectfully submitted,

JOSEPH C. JACOBS

JOHN B. CHANDLER, JR.

STEWART D. ALLEN

*Attorneys for Appellees,
The American Waterways
Operators, Inc., et al.*

LEROY COLLINS

ERVIN, VARN, JACOBS & ODOM

ROGERS, TOWERS, BAILEY, JONES & GAY
Of Counsel

NICHOLAS J. HEALY

GORDON W. PAULSEN

*Attorneys for Appellees,
American Institute of
Merchant Shipping,
Assuranceforeningen
Gard, et al.*

HAIGHT, GARDNER, POOR & HAVENS

HEALY & BAILLIE

FOWLER, WHITE, GILLEN, HUMKEY, KINNEY
AND BOGGS, P.A.

DEWEY R. VILLAREAL, JR.

RAYMOND A. CONNELL

EMIL A. KRATOVIL, JR.

Of Counsel